No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Clarence McAnisse Rasor, deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, deceased, et al.,

Appellees.

OPENING BRIEF OF APPELLANTS

THURMAN ARNOLD
1200 Eighteenth Street, N.W.
Washington 6, D. C.

FRANK BUREN
2466 East 56th Street
Los Angeles 11, Calif.

STERLING CARR
One Montgomery Street
San Francisco 4, Calif.

Attorneys for Appellants

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

Subject Index

Table of Authorities Cited

STATUTES

TEXTS

No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Clarence McAnisse Rasor, deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, deceased, et al.,

Appellees.

OPENING BRIEF OF APPELLANTS

JURISDICTION

This is an appeal from a final judgment of dismissal, entered in the District Court of the United States for the Northern District of California, Southern Division, on November 24, 1948 (R. 611-621). Notice of Appeal was filed December 20, 1948 (28 U.S.C. Sec. 230, Rule 73 R.C.P.) (R. 624). Jurisdiction of this Court is apparent (Jud. Code Sec. 128, 28 U.S.C. Sec. 225(a).

This is a civil action between corporate citizens of Delaware and Nevada and various individuals, as plaintiffs, and a British corporation and corporate citizens of other states of the United States, as defendants (Sec. 24 Jud. Code, 28 U.S.C. Sec. 41 (1) (c)). The right of plaintiffs to sue is provided by Section 4 of the Clayton Act (Act. Oct. 15, 1914, Ch. 323, Sec. 4, 38 Stat. 731, 15 U.S.C. Sec. 15), which reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold damages by him sustained, and the costs of suit, including reasonable attorneys' fee."

The acts referred to as forbidden are defined in Sections 1 and 2 of the Sherman Act, to-wit:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."
>
> "Every person who shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

In combination, these statutes reveal the jurisdiction and venue of the District Court.

STATEMENT OF THE PLEADINGS AND FACTS

Plaintiffs herein commenced this action for damages against the defendants herein on September 11, 1947—filing the same in the United States District Court for the Northern District of California, Southern Division, Hon. Michael J. Roche, presiding. By their complaint (R. 3-80), and the two amendments thereto (R. 80-82), plaintiffs seeks to recover treble damages, based on the allegations of a violation of the anti-trust laws.

To the complaint, the defendants filed motions to dismiss and motions for summary judgment, supported by affidavits of various character. **By such motions, defendants admitted all of the allegations of the complaint well pleaded.**

Purity Cheese Co. v. Frank Ryser Co., 153 F.(2), 88 (7th Cir.);

United States v. Frankfort, etc., 324 U.S. 293, 65 S.Ct. 661;

Ansehl v. Puritan, etc., 61 F.(2) 131 (8th Cir.);

Ledbetter v. Farmers, etc., 142 F.(2) 147, (4th Cir.), Cert. den., 323 U.S. 719;

Willson v. Graphol Products Co., 165 F.(2) 446.

Therefore, the complaint herein is the basis of the action, and in the absence of a denial by the defendants of the allegations thereof, such allegations stand as admitted facts; it is only if these facts, so admitted, do not in themselves state a cause of action, can the action be dismissed.

Furthermore, affidavits filed in support of a motion to dismiss or for summary judgment, cannot be used to contradict the allegations of the complaint.

Domestic and Foreign Commerce Corp. v. Littlejohn, 165 F.(2) 235, at 237;

Michel v. Meyer, 8 F.R.D. 464;

Frederick Hart & Co. v. Recordgraph Corp., (3rd Cir.) 169 F.(2) 580.

By reason of the foregoing, it would appear that the proper and convenient way to present the contentions of appellants on this appeal is to set out specifically in this brief the portions of the complaint which appellants contend are controlling herein as setting forth a cause of action and as demonstrating that the rulings of the lower court, set forth in its decision, are contrary to law and without basis either in fact or in law. Accordingly, we shall so proceed, and trust that this Court will find such approach both convenient and helpful.

The complaint states first, the Jurisdiction and Venue (R. 4); then the Description of Plaintiffs (R. 5), followed by a Description of Defendants (R. 6-11); then follows Definition of Terms used in the complaint (R. 11-12), followed by the Nature of Trade and Areas Involved, including (a) The Commodity, and (b) Uses (R. 12-16). Following is a history of the Development of the Industry, including (1) Lake Borax, (2) Marsh Borax, (3) Colemanite, and (4) Kernite and Searles Lake Production (R. 16-19).

The complaint then describes the Control of Industry, including the Control of Crude Borates and Control of Lake Brine Borax (R. 19-28); then follows a description of the Methods of Sale (R. 28-30).

Then follows the Offenses Charged (R. 30-39), as follows, to-wit:

> 64. That at the time or times herein set forth, the defendants, each well knowing all the matters and things hereinbefore alleged, and continuing thereafter up to some date in the year 1944, the exact date of which is to plaintiff unknown, were engaged in a combination and conspiracy to restrain unreasonably, and pursuant to said combination and conspiracy have unreasonably restrained, the aforesaid trade and commerce in the mining, production, processing, manufacture, distribution and sale of crude borates, refined borax and boric acid among the several states of the United States and with foreign nations, and have conspired and combined, as herein set forth, to monopolize, have attempted to monopolize, and have suc-

ceeded in monopolizing such trade and commerce, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended (15 U.S.C. Secs. 1 and 2), commonly known as the Sherman Act, and which combination and conspiracy in this paragraph described is hereinafter referred to as the "General Conspiracy."

65. The aforesaid combination and general conspiracy to restrain trade and commerce, the combination and conspiracy to monopolize, attempts to monopolize, and conspiracy to monopolize such trade and commerce, have consisted of a continuing agreement and concert of action among the defendants, the substantial terms, purposes and intent of which have been that defendants:

(a) agree to acquire control of approximately 95 per cent of the world's known deposits of borate minerals, including approximately 100 per cent of sodium borate (kernite and tincal) deposits:

(1) by purchase of newly discovered deposits;

(2) by purchase of deposits actively worked by others;

(b) agree to acquire by lease or purchase approximately 90 per cent of the world's known lake brines from which borax may be extracted;

(c) agree to purchase refining facilities of all competitors who also own deposits of borate minerals;

(d) agree to dismantle and close all refining facilities and to close all mines purchased from competitors who work deposits of borate minerals;

(e) agree to withhold from the market all colemanite ore where such ore would compete with kernite;

(f) agree to allocate among themselves the tonnage of crude borates, refined borax, and boric acid that may be sold by each defendant in various nations and in various markets, including the United States market;

(g) agree to allocate among themselves consumers of crude borates, refined borax, and boric acid, on the basis that the defendant company first supplying a user shall enjoy thereafter the right to sell such user exclusively;

(h) agree that each defendant will refuse to sell crude borates, refined borax and boric acid to customers of any other defendant;

(i) agree to reallocate among themselves periodically the amount of tonnage of crude borates, refined borax and boric acid that may be sold by each defendant in certain nations, in certain markets, and to various types and classes of consumers;

(j) agree as to the customers to which certain types of crude borates, refined borax, and boric acid may be sold;

(k) agree that no user of crude borates, refined borax, and boric acid may purchase such products except on condition that such user shall not resell or export such products;

(l) agree to trade and repurchase any crude borates, refined borax and boric acid resold or exported by users and to blacklist and boycott such users;

(m) agree to permit independent distributors to sell crude borates, refined borax, and boric acid to certain designated customers on terms fixed by the defendants;

(n) agree that no sales of refined borax shall be made for packaging by independent distributors;

(o) agree that only defendant Borax Consolidated, Ltd., or its subsidiaries, shall sell and distribute packaged borax;

(p) agree to fix the prices at which crude borates, refined borax, and boric acid will be sold to users and distributors,

(1) by fixing arbitrary and noncompetitive prices, discounts and conditions of sale on crude borates, refined borax, and boric acid;

(2) by establishing arbitrary and fixed differentials in the prices to be charged for crude borates, the various types of refined borax, and boric acid;

(3) by establishing arbitrary and fixed differentials in the prices to be charged users for the same type and quality of crude borates, refined borax, or boric acid, based upon the use to which such products are put;

(4) by fixing a minimum tonnage for a carload of crude borates, refined borax, and boric acid, and selling only on an f.o.b. plant basis, freight allowed to destination;

(5) by refusing to ship crude borates, refined borax, and boric acid in the United States by any means other than by rail;

(6) by fixing the prices at which independent distributors of defendants may resell crude borates, refined borax, and boric acid to users to whom defendants permit such independent distributors to resell.

66. During the period of time covered by this complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy to restrain trade unreasonably, combination and conspiracy to monopolize, attempt to monopolize, and actual monopolization of the interstate and foreign trade and commerce hereinbefore alleged, and to destroy competition, the defendants by agreements and concerted action have done the things which, as herein alleged, they conspired to do, and more particularly have done, among others, the following acts and things:

The Borax Industry in 1929

67. In 1929, the following companies were producing crude borates, refined borax, and boric acid in the United States: said Borax Consolidated, Ltd., through its subsidiary, said Pacific Coast Borax Company; said American Potash & Chemical Corporation; said Western Borax Company; said West End Chemical Company; and said Suckow Borax Mines Consolidated. The total production of these companies amounted approximately to 95% of the total world production.

68. Distribution and sale of crude borates, refined borax and boric acid in 1929 was made in the following manner: (a) Said APCC sold its refined borax and boric acid in the United States market direct to users and to independent distributors who resold to users. Its sales of the same product in foreign markets, except in the Orient and Canada, were made by C. Christopherson Sons, Ltd., of London, England, acting as agent. Sales in the Orient, except China, were made by Imperial Chemical Industries, Ltd., of London, England, and in Canada by the St. Lawrence Chemical Company of Montreal, Canada, acting as agents. (b) Said PCB sold crude borates, refined borax and boric acid in the United States market direct to users or to independent distributors, who resold to users. It shipped crude borates to refineries owned by its parent, BCL, and located in London, England; Dunquerque, France; Port Dundas, Glascow, Scotland; Barcelona, Spain, and Standlau, Austria, where they were refined and sold as refined borax and boric acid by BCL in all markets of

the world except the United States and Cuba,—which were supplied by PCB. (c) Plaintiff SBM sold crude borates and concentrate borates directly to users and to independent distributors who resold to users. Its sales were made in the United States and Europe. (d) Said WEC sold its entire production of refined borax and boric acid to said Stauffer Chemical Company, which, in turn, sold in the United States market, South America, the Orient, and in Europe. (e) Said WBC sold crude borates to Deautche Vereingen (hereinafter referred to as DBV), an association of German refiners which refined the crude borates and sold refined borax and boric acid in Germany and in other European countries. DBV shared equally with said WBC the profits derived from its sales of refined borax and boric acid.

The 1929 Agreement

69. During the year 1929, various meetings were held in England and Europe between BCL, APCC, PCB and DBV, with the result that in the fall of 1929, in either England or Germany, said companies made and entered into an agreement, herein referred to as the "1929 Agreement" or the "General Conspiracy," under the terms of which the ownership and control of borax properties of all kinds and also borax in various of its forms, products and by-products, and the production and sale thereof, were agreed to be monopolized and controlled, and further, by the terms of which agreement it was provided that all competitors of the business of the parties to said agreement should be eliminated, and further, prices were fixed at which crude borates, refined borax and boric acid were to be sold; world markets and customers in specific markets were allocated among them; the production of said West End Chemical Company was limited; and the tonnage to be sold in the United States and other markets by said Stauffer Chemical Company and said Western was restricted. Said agreement was to be effective for one year, renewable annually upon three months' notice prior to expiration by mutual agreement among the parties. Such agreement was subsequently extended and modified, and, as modified, remained in full force and effect until sometime in 1944. From and after September 1, 1939, the parties to the

annual renewal of such agreement were said BCL, PCB, APCC and Stauffer. The parties to the 1929 agreement and its subsequent renewals were BLC, PCB, APCC and DBV (the latter until September, 1939). Defendants Stauffer Chemical Company and Western Borax Company, Ltd. agreed to and became at said time parties to said agreement, as will be set forth more particularly hereinafter.

The above Paragraph 69 was later amended (R. 80) to read as follows:

Paragraph 69, page 28, of said complaint, is amended to read as follows:

The 1929 Agreement

69. That during the year 1929, various meetings were held in England and Europe between BCL, APCC, PCB and DBV; that in the month of September, 1929, further meetings were held in the City and County of San Francisco, State of California, between said BCL, PCB, DBV, Stauffer Chemical Company, West End Chemical Company, and Western Borax Company, with the result that under date of the 27th day of November, 1929, said parties made and entered into an agreement, herein referred to as the "1929 Agreement" or the "General Conspiracy"—under the terms of which the ownership and control of borax properties of all kinds and also borax in various of its forms, products and by-products, and the production and sale thereof, were agreed to be monopolized and controlled; and, further, by the terms of which agreement it was provided that all competitors of the business of the parties to said agreement should be eliminated; and, further, prices were fixed at which crude borates, refined borax and boric acid were to be sold; world markets and customers in specific markets were allocated among them; the production of said West End Chemical Company was limited; and the tonnage to be sold in the United States and other markets by said Stauffer Chemical Company and said Western Borax Company, was restricted. Said agreement was to be effective for one year, renewable annually upon three months' notice prior to expiration by mutual agreement among the parties.

That within one year subsequent to said 27th day of November, 1929, defendant APCC and said Clarence McAnisse Rasor agreed to, and became parties to, said agreement and all extensions thereof.

Said General Conspiracy was subsequently and from time to time extended, enlarged and modified and as such remained in full force and effect until sometime in 1944; that all of said parties so named as members of said General Conspiracy remained as such during the life of said conspiracy.

70. As part of said 1929 agreement to fix the terms, conditions and manner of sale and distribution of crude borates, refined borax and boric acid, price schedules were adopted for sales by defendants of such products to users and distributors. Re-sale prices of distributors were also fixed. It was agreed that all sales made in carload lots in the United States would be made by the parties to the agreement, with less than carload lot sales reserved to distributors or jobbers; that a minimum carload would be 30 tons; that freight charges be made on the basis of all-rail, f.o.b. plant, freight allowed to destination; that the United States be divided into zones in which uniform prices would apply regardless of distance between the refinery and destination; that customers located in the same city, or on the same rail route, be prohibited from pooling orders so as to obtain carload prices; that a jobber or distributor be defined as a party or concern taking a minimum of two carloads a year.

71. As part of said 1929 agreement, it was agreed that no user be permitted to resell or export any crude borates, refined borax or boric acid; that no independent distributor be permitted to sell to any user except those approved by the parties to the agreement; that no independent distributor be permitted to export crude borates, refined borax, or boric acid. This restriction was thereafter rigidly enforced by a system of espionage under which the parties to the agreement attempted to and did locate and repurchase any crude borates, refined borax or boric acid sold contrary to the provisions of the agreement set out in this paragraph. Any user or distributor so selling was blacklisted and boycotted.

72. As part of said 1929 agreement, the parties agreed to allocate among themselves world markets for crude borates, refined borax and boric acid on the basis of tonnage, customers and types of use to which such products are put; to divide customers among themselves on the basis that the first supplier offering crude borates, refined borax and boric acid would thereafter enjoy the exclusive right to supply such user; that no party to the agreement would supply any customer previously supplied by any other party to the agreement; that no party to the agreement would solicit the customers of any other party to the agreement; that no party to the agreement would supply any customer with a new borax product if any other party to the agreement was unable to offer the same product to users in the same general industry.

73. That plaintiffs are informed and believe, and therefore allege, that said "1929 Agreement" constituted a reduction to writing of the previous verbal and written agreements, understanding, combinations and conspiracies of defendants, and, from time to time made and entered into by said defendants during the years previous to the making and entering into of said "Agreement of 1929."

The above Paragraph 73 was later amended (R. 82) to read as follows:

73. That as part of said 1929 Agreement, said defendants agreed specifically among themselves to destroy and eliminate the said John K. Suckow and each and all of his companies and associates from all operations of every kind and involving the production, distribution or sale of borax or any of its products.

74. That said "General Conspiracy" and the conspiracies, acts and things complained of hereinbefore and hereinafter in this complaint set forth, were and are continuing conspiracies, and each separate thing and act alleged herein and performed by the defendants, or some of them, or any of them, have been and are acts, things and combinations contributing to and forming a part of said "General Conspiracy."

75. That pursuant to said "General Conspiracy," defendants, or some of them, proceeded to, and did, take

steps and means to eliminate, through purchase or otherwise, various competitors of said defendants, not parties to said conspiracy, combination or agreement, including plaintiffs.

The complaint then goes on to describe, in Paragraphs 76 and 77 thereof (R. 39-40), the conditions involving Dehydrated Borax and the fixing of prices in connection therewith.

Following this, the complaint sets forth the Effects of the Conspiracy and alleges, in Paragraph 78 (R. 40), as follows:

78. The agreement and concerted actions of the defendants, alleged in this complaint, both hereinbefore and hereinafter, pursuant to and in furtherance of the conspiracies hereinbefore and hereinafter alleged in this complaint, have had the effect, as intended by the defendants, of fixing the terms, conditions and manner in which crude borates, refined borax, boric acid and kernite are mined, produced, manufactured, distributed and sold in the United States and foreign countries; of channelizing the system of distribution and sale of such products throughout the United States and in foreign countries; of fixing prices on such products sold to industrial users, as well as resale prices on such products when sold to industrial users, independent distributors of defendants, as well as other terms and conditions of resale; of monopolizing virtually 100% of the world's supply of borate minerals, including 100% (except said "Little Placer") of the world's known deposits of the most valuable sodium borate (kernite and tincal); of monopolizing approximately 90% of the world's supply of refined borax produced from lake brines; of determining the use to which refined borax and boric acid may be put, as well as the conditions under which they may be used.

The following portion of the complaint deals with the appellants, commencing with Paragraph 79 (R. 41, et seq.), and wherein is set forth the story of John K. Suckow and his activities in the borax field and the discoveries he made therein. The allegations of this paragraph show how appellees gradually

planned and schemed to place Suckow under their control and the various steps by which such control and domination were sought. Such paragraph is as follows:

> John K. Suckow came to the United States of America in 1898, and subsequently became a citizen thereof. He passed his examination as a pharmacist in New York City, studied medicine at the University of Southern California, where he obtained his degree of Doctor of Medicine in the year 1905. Becoming interested in farming and having the intention of erecting a desert hospital, he and his wife filed Desert Land Entries on Section 22, Township 11 N., Range 8 W., in the Mojave Desert, Kramer District, State of California. This was during November, 1912.
>
> While drilling for water on said Section 22, he discovered a colemanite deposit; he did not know what the material was, nor its value. This material he showed to C. M. Rasor, an agent of defendant PCB. Lou Rasor, brother of said C. M. Rasor, and who was at said time a patient of said Dr. Suckow, advised said Suckow that it was colemanite. Shortly thereafter, John Ryan of the PCB, or some of its affiliates, called upon said Suckow and advised him that there was some colemanite in such sample but that it was not much, and offered Suckow $4,000 for the property from which said material was produced.
>
> In 1913, said Suckow sold whatever interest he had in a portion of said property where the said discovery was made, to defendant United States Borax Company for the sum of $4500.00. The property disposed of was the northwest quarter and the east half of the northeast quarter of Section 22.
>
> In March of 1917, said Suckow received a patent to the balance of said Section 22, and on October 22, 1917, he conveyed an undivided 75 per cent interest in the said property to defendant Stauffer Chemical Company, for which said Suckow was to receive $60,000 from an operating company, and become manager thereof. Said Stauffer Chemical Company was to erect a borax refinery in Los Angeles, California.
>
> Early in 1918, said Stauffer Chemical Company advised said Suckow that a Mr. Rasor had been informed of said

1917 agreement and was very interested in ascertaining the borax contents of the property; subsequently, and on or about December 2d, 1918, a new agreement was entered into by said Suckow and defendant Stauffer Chemical Company and to which agreement defendant Pacific Coast Borax Company was a party. By said agreement, it was provided that said Suckow should control the new company, thereafter incorporated under the name of Suckow Chemical Company, through a voting trust of his and the stock owned by said Stauffer Chemical Company; that, in truth and in fact, the whole purpose of the formation of said Suckow Chemical Company and the distribution of the stock thereof, as herein set forth, was to prevent said Suckow from independently, and as an individual, operating upon said Section 22 and ultimately to secure from him his stock in said Suckow Chemical Company. That after the organization of said company, said Suckow was constantly harassed by defendant Stauffer, PCB, and various of the other defendants herein, and prevented, under one pretext or another and by one objection after another, all unfounded, from carrying on and operating said Suckow Chemical Company as originally contemplated by him and/or for the purposes or in the manner indicated by said last-named defendants when the question of the incorporation of said Suckow Chemical Company was discussed with said Suckow; as a result of said opposition and actions of said defendants and in order to save and protect the interest that he, the said Suckow, had in said Suckow Chemical Company and the properties owned by such company, he was forced to, and did, on or about June 30, 1925, sell all of his capital stock in said Suckow Chemical Company for the sum of $150,000 to the defendant PCB. That as a part of said plan to eliminate said Suckow from said Suckow Chemical Company, said Victor C. Emden was employed as an agent by defendant PCB to bring about such sale, and for the purpose thereof to represent himself as an independent purchaser, in an endeavor to hold down the price ultimately to be paid to said Suckow; that plaintiffs are advised and believe, and on such information and belief allege, that for his said services in behalf of said PCB, said Emden was paid the sum of $15,000 by said PCB;

that in addition to said payment, the Suckow,—without knowledge of the fact that said PCB had paid said $15,000 to said Emden, paid to said Emden the sum of $10,000 as commission upon said sale; that said payment by said PCB to said Emden was not discovered by, and did not become known to, plaintiffs herein or said Suckow until sometime approximately within two years prior to the commencement of this action.

Said Suckow Chemical Company is still in existence, according to the information and belief of plaintiffs, and the stock thereof is held by defendants Pacific Coast Borax Company and said Stauffer Chemical Company, or one of said corporations.

80. On or about January 1, 1916, said Suckow, with other co-locators, filed placer mining locations covering the whole of Section 14, T. 11 N., R. 8 W., S.B.M., which at that time was vacant public land of the United States. Said locators claimed the entire section as prospective borax-bearing lands. Subsequently, notices of intention to hold mining claims were filed.

In 1917, various adverse locations were filed all over the southwest quarter of said Section 14 by T. M. Slusser and associates; one George R. Widdess located adversely on the east half of the southeast quarter on May 16, 1917; that plaintiffs are informed and believe, and therefore allege, that said Slusser and associates and said Widdess were, and did so act in the matter of said locations as, agents and representatives of said defendants, or some of them; the purpose of said various locations was to cloud the title of said Suckow in and to said properties, all with the purpose of forcing said Suckow to make and enter into the contract referred to hereinafter.

* * * * * * *

That thereafter and on October 24, 1921, and pursuant to said agreement, defendant United States Borax Company conveyed to said Suckow an undivided one-half interest in and to the S.W. ¼ of said Section 14. Subsequently, and on November 7, 1922, said defendant, pursuant to said agreement, caused to be conveyed to said Suckow an undivided one-half interest in the west half of the S. E. ¼ of said section.

All of said patents were obtained on the discovery of colemanite by drilling, *and it was not known to said Suckow,—and the fact thereof was concealed by defendants from said Suckow at said time, that more valuable deposits of sodium borate actually underlaid the colemanite.*

On or about August 19, 1922, and after securing the patent on the S.W.¼ and before issuance of the patent for the West Half of the S.E.¼, one C. R. Dudley, representing defendant Pacific Coast Borax Company, located the south half of Section 14 as Lode Claims 1 to 9, all without Suckow's knowledge and on lands claimed by said Suckow as placer claims.

Plaintiffs are informed and believe, and therefore allege, that said locations were made for the purpose of further clouding Suckow's title and apparently making him believe that by subsequently turning over to him at a later date a half interest in Lode Claims 1 to 7, that his interest in the whole South Half of said section were safeguarded against other comers. However, Lode Claims 8 and 9 were not transferred to Suckow, who had no knowledge of their existence nor that said last-mentioned claims were located on the eastern half of the S.E.1.4.

Sometime during the year 1922, the exact date being to plaintiffs at this time unknown, defendant Pacific Coast Borax Company, and its associates, abandoned any claim to the North Half of said Section 14; subsequently thereto, said Suckow obtained title to the North Half of said Section 14. In the year 1925, defendant United States Borax Company obtained a patent to the East Half of the S.E.¼ of said Section 14 on the location of said Widdess and upon obtaining said patent refused to convey to said Suckow an undivided one-half interest therein, as said defendant was obligated to do by said agreement of December 21, 1918, said defendant claiming that said property was not included in said agreement.

In the fall of 1926, said Suckow commenced drilling on the common property in said Section 14, and in April, 1927, defendant United States Borax Company, on its own behalf as well as on behalf and acting for its associates, and some of the other defendants herein, advised said Suckow that it had learned that he had commenced de-

velopment work on a mine located on the said common property, to-wit, on the West Half of the Southeast Quarter of Section 14, and that said defendants did not desire to join in the work. During the next few months, said Suckow sunk a deep shaft and discovered a rich deposit of tincal, and when defendant Pacific Coast Borax Company learned of this discovery, defendant Pacific Coast Borax Company promptly advised said Suckow that it and its associates did desire to participate, not only in the mining operations but also in the marketing of all ore produced as a result thereof. Said Suckow refused to comply with such demand, whereupon defendant Pacific Coast Borax Company, and its associates, immediately began to harass said Suckow, notifying him that certain of his equipment was located on Section 23, which belonged to Pacific Coast Borax Company, and demanding immediate removal thereof; in addition, said Pacific Coast Borax Company, and other defendants herein, wrote to various purchasers of the ore produced by said Suckow from said development work, advising them that they would be held responsible for one-half of the value thereof. In further pursuance of said harassing endeavors, said defendant Borax Consolidated, Ltd., on or about September 21, 1927, commenced an action against defendant Suckow in the Superior Court of the State of California, in and for the County of Kern, entitled, "Borax Consolidated, Ltd., versus John K. Suckow" and numbered on the records of said court No. 20694, in which action plaintiffs therein sought an accounting from defendant Suckow and a judgment determining the rights of plaintiffs and its associates to the ore and for an injunction to prevent further mining of said property by said Suckow. After a deposition of said Dr. Suckow was taken in said action, the said action was dismissed by BCL on or about the month of March, 1930.

That on or about the 13th day of August, 1929, said Suckow commenced an action against defendant United States Borax Company and certain other defendants named herein to compel said defendants to transfer and convey to him, pursuant to said agreement of December 21, 1918, hereinabove set forth, an undivided one-half interest to the E.½ of the said S.E.¼ of said Section 14. Said action never

came to trial; however, a consent judgment was rendered on October 2, 1934, as a part of the agreement of August 18, 1934, hereinafter more specifically referred to.

81. That on the 6th day of March, 1929, plaintiff Suckow Borax Mines Consolidated, Inc., was incorporated under the laws of the State of Delaware, whereupon the said John K. Suckow deeded and transferred to said corporation his undivided one-half interest in and to said 240 acres of land in the South Half of said Section 14 and also the whole title and fee of 40 acres in the North Half of said section, on which the calcining plant was situated, and thereafter the said Suckow Borax Mines Consolidated, Inc. became, and was, the owner and holder of the legal title to said property until such times as hereinafter set forth. That subsequent to the organization of said Suckow Borax Mines Consolidated, Inc., said Suckow caused said corporation last-named to make and enter into a contract dated on or about September 4, 1929, with N. K. Kemische Fabrike Gembo, hereinafter called Gembo; said Gembo was a Dutch corporation and engaged in the business of marketing chemicals. Said contract provided that said Suckow Borax Mines Consolidated, Inc., should sell, at cost, 4,000 tons of crude borax to Gembo each year; the latter was to erect a refinery in Holland and the two companies were to share equally in the net profits derived from the sales by Gembo of the refined products produced at said refinery.

82. When defendants herein learned of the making of said contract with said Gembo and that through such contract an outlet was afforded to said Suckow Company by said agreement, and that it, the said Suckow Company was in a position to distribute sodium borate in Europe to various users thereof, all in competition with said defendants, said defendants, or some of them, made and entered into, as a part of and in furtherance of said General Conspiracy, an unlawful plan to destroy the said business of said Suckow and said Suckow Company, and all possibility of his or its performance of said Gembo contract, planning and scheming, through various fictitious actions at law and in equity, and by all and various other means within their power, to destroy the said Suckow and said Suckow Company and his and its said business and

possibilities; in pursuance of such plan, one C. B. Zabriskie, then president of defendant Pacific Coast Borax Company, and defendant Ashburn, as attorney for said company, together with various of the other defendants named herein, caused said defendants herein, or some of them, to enter upon a course of conduct to bring about the financial and business destruction of said Suckow and said Suckow Company.

Following this, comes Paragraph 83, setting forth a statement of the **overt acts** performed and carried out by the defendants pursuant to the conspiracy. Said Paragraph 83 (R. 53) is as follows:

> 83. Plaintiffs have been informed and believe, and therefore allege, that in pursuance of said General Conspiracy defendants, or some of them—those acting, doing so as agents and representatives of the remaining defendants—did perform and carry out, among others, the following overt acts, to-wit:
>
> (a) Defendant Pacific Coast Borax Company and other defendants at various times attempted to acquire, by purchase or otherwise, said Suckow Company's undivided one-half interest in said jointly owned property in said Section 14, and endeavored, by various means, pressures and activities, to force said Suckow Company to said sale, and also endeavored by various means to force said Suckow to sell to them the property in said Kramer District personally owned by said Suckow and not belonging to said Suckow Company;
>
> (b) That on or about the 29th day of March, 1930, defendant Borax Consolidated, Ltd., on its own behalf and the behalf of said other defendants, commenced an action in the United States District Court for the Southern District of California against said Suckow Borax Mines Consolidated, Inc. and said John K. Suckow, praying for an injunction restraining said defendants from mining or operating upon said Section 14, and also for an accounting and for damages; said action will be hereinafter designated as the Equity Suit. Said application for an injunction was heard before United States District Judge Paul J.

McCormick in July, 1930, and was denied. The remaining issues in said action came on for trial in April, 1932. Said equity action was filed for the purpose of harassing said Suckow and said Suckow Company, ostensibly claiming ouster by Suckow and demanding an accounting, and with the idea and intent, if possible, of terminating the mining operations, or, if not, of disrupting ore delivery to Europe, and of forcing said Suckow to violate his own contracts, and of forcing him and it finally to sell to defendants, or some of them, the said property owned and held by said Suckow Company and said Suckow; and that if said sale could not be consummated as desired by defendants, to destroy and eliminate all competition by said Suckow and said Suckow Company with defendant Borax Consolidated, Ltd., and said other defendants, in all borax operations throughout Europe and the United States.

That during all of said times in this paragraph referred to, and also during the time of the operation by said Suckow and said Suckow Company of said mining property, said Company and said Suckow endeavored in every way possible to cooperate with defendants owning the other undivided one-half of said mining property, and during said operations, and among other things, offered to account to defendants and to segregate the extracted ore ton by ton, to mine equally with defendants, or the one holding title to said one-half of said mining property, and in various other ways; that all of said offers of said Suckow and said Suckow Company were rejected by said defendants.

That upon the hearing of said equity suit, the question of the value of the ore produced from the property involved in such litigation arose, and by chicane and false testimony and by other devious means, the court trying said equity suit was persuaded to fix the value of said ore at $21.89 per long ton removed; that in the bankruptcy proceedings subsequently involving said Suckow Borax Mines Consolidated, Inc., and hereinafter described, the value of said ore was fixed by the United States District Court at $2.50 per ton. Upon the making of said order in said equity suit fixing the value of said ore as aforesaid, said Suckow Company was obliged to, and did, cease

all mining operations, and the exorbitant value so placed on said ore compelled the closing down of said mining property.

THE BANKRUPTCY PROCEEDINGS

(c) That upon the 30th day of June, 1931, defendant Pacific Coast Borax Company, defendant Ashburn, and various others of said defendants, caused to be filed in the United States District Court in and for the Southern District of California, an involuntary petition in bankruptcy against plaintiff Suckow Borax Mines Consolidated, Inc. Such petition was purportedly filed by defendant Walter H. Moses, an attorney for one L. E. Ellington, Foltz Electric Company and Pacific Iron & Steel Company, with claims of $88, $200 and $1,206.27, respectively; as a matter of fact, said Ellington claim had been paid before said petition was signed by Ellington and the said Foltz claim was paid in the regular course of business between the date of verifying the petition and its filing; plaintiffs are informed and believe, and therefore allege, that the claim of said Pacific Iron & Steel Company was purchased or paid for prior to the filing of said petition, by one of the defendants herein, or by their attorneys or agents, the exact one of which being to plaintiffs at this time unknown; that said bankruptcy petition was brought about, in part, through the efforts of one Victor C. Emden, a paid agent and employee of defendant Pacific Coast Borax Company, and who had been previously so employed to secure a signature to said involuntary bankruptcy petition (all or part of such expenses being paid by C. M. Rasor as agent of PCB), with the thought, intent and purpose on the part of defendants to harass and annoy said Suckow and plaintiff Suckow Borax Mines Consolidated, Inc. by said bankruptcy proceedings,—in order to assist in forcing said Suckow and said Suckow Borax Mines to cease business and ultimately to sell to said defendants, or some of them, at a price far below the real and true value of the properties so owned by said Suckow and said Suckow Company, all pursuant to said "General Conspiracy' hereinabove alleged. That in addition, it was the said

plan and conspiracy of said defendants to build up to as great an extent as possible, by fictitious and other means, the indebtedness of said Suckow Company and at the same time hold down the value of the assets of said Suckow Company, including the estimated value of ore owned by said company; and with this intent and purpose in mind, the said Emden, together with said defendants, secured the signature of one L. H. Wilson to said petition of involuntary bankruptcy and who claimed that he was a stockholder of said Suckow Company and that before purchasing said stock he had not been shown a copy of the permit of the Corporation Commissioner of the State of California. Said claim was wholly false and untrue. In addition, said defendants and said Emden caused to be listed among the liabilities of said Suckow Company a purported claim of said Suckow against said Suckow Company in the amount of $76,922, and another purported claim of said Suckow against said Suckow Company in the sum of $15,621—which latter sum had originally been loaned to said Suckow Company but subsequently, and before said filing of said bankruptcy petition, had been donated and released to said Suckow Company by said Suckow. That in truth and in fact, said Suckow did not make said claim of $76,922 against said Suckow Company and at all times contended and insisted that said Suckow Company did not owe him said last-named sum or any part thereof and as based on the alleged facts of said claim. Said Suckow Company resisted said petition for involuntary bankruptcy and contended that its assets exceeded its liabilities, and on a hearing as to the value of said assets, said defendants, in the face of the fact that they had previously contended that the value of the ore on said property was $21.89 per long ton in the ground, in said bankruptcy proceeding contended that said value of said ore did not exceed $2.50 per ton in the ground. Through false and fraudulent testimony, said defendants persuaded the Referee in Bankruptcy—and ultimately the Judge of the United States District Court hearing said bankruptcy proceeding —that the value of said ore did not exceed $2.50 per ton and that the alleged claims of said Suckow against

said Suckow Company, as above set forth, were valid,—with the result that on March 2, 1933, said Suckow Company was formally adjudged a bankrupt, and in the following month a trustee in bankruptcy of said Suckow Company was elected and appointed. That thereafter, and in due course, plaintiff Suckow Company appealed to the United States District Court of Appeals in and for the Ninth Circuit, from said order of adjudication; that ultimately, and on or about the 18th of August, 1934, when the settlement hereinafter referred to was made, and as a part thereof, said appeal was dismissed.

(d) That subsequent to the adjudication of said Suckow Company as above set forth, said Suckow requested said bankruptcy trustee to lease to him said property so owned by said Suckow Company, but defendants objected thereto, —and due to said opposition, said request was denied. During all of said time said defendant Pacific Coast Borax Company and other defendants herein continued their endeavors to acquire all of the properties and assets of said Suckow Company and to force said Suckow into a sale of all of his interest in borax-bearing lands in said Kramer District and in said Suckow Company, to said defendants. When this was not able of accomplishment, defendant Pacific Coast Borax Company commenced endeavors to secure a lease on said properties, both for the purpose of preventing any other operation of said properties as well as to eliminate competition of said ore from said properties with that from other properties owned by said defendants, or some of them, and to further effect this said purpose defendants commenced operations to cause said Gembo contract to be cancelled or otherwise disposed of, as well as to take over the customers of the said Suckow Company, to-wit, Gembo Company and the Liverpool Borax Company, as customers or agents for the sale and distribution of borax throughout various portions of Europe. Defendant Pacific Coast Borax Company was subsequently successful in its efforts to secure a lease upon said property of said bankrupt, with the result that on or about the 17th day of April, 1934, and after court proceedings to such end, a lease was granted by said trustee to said defendant Pacific Coast Borax Company, which lease was for

a period of five years from April, 1934 to April, 1939, and which gave and granted to said lessee therein named immediate possession; said lease covered 240 acres of said bankrupt's property and an additional 40 acres on which the calcining plant was located. It was further provided that said lessee should not be required to work or perform services upon said property covered thereby pending the decision of the appeal of said bankrupt from the order adjudging it such bankrupt; the rental of said premises was to be at the rate of $5.00 per ton for the first 500 long tons, $4.00 per ton for the second 500 long tons, and $2.50 per ton for all ore in excess of 1000 tons removed on account of the bankrupt's share of the ore and mined during any single month.

(e) Said lease was obtained by fraud and misrepresentation, in that defendants claimed that they were not in violation of the anti-trust laws of the United States and were not a monopoly or price-fixers, whereas in truth and in fact said defendants were at said time guilty of such violations of said anti-trust laws; that said lease was also unjust and unfair and unbusinesslike, and was sought solely for the purpose of securing the sole contract and operation of said property and in order to control the production therefrom. That the granting of said lease by said trustee was vigorously opposed by plaintiffs and the officers of said SBM refused to sign or agree to the same.

That in due course, said bankrupt instituted a proceeding to review the said order of said Referee authorizing said lease, and upon its affirmation by said United States District Court appealed therefrom to the United States Circuit Court in and for the Ninth Circuit, where said appeal remained until the same was dismissed pursuant to said stipulation and settlement of the 18th of August, 1934.

(f) Meanwhile, and in order further to harass said Suckow and said Suckow Company, defendant Pacific Coast Borax Company commenced a patent infringement suit in the United States District Court in and for the Southern District of California against said Suckow Company, claiming that machinery used by said Suckow Company in the handling of said ore infringed upon certain patents held by plaintiff in said action; that, as aforesaid, said action

was commenced with the idea of taking whatever action might be possible to complicate matters further for said Suckow and said Suckow Company; said action was tried in said court on or about September, 1932, and an interlocutory decree was granted restraining defendant therein from using a certain method for calcining borax. Thereupon, said defendant in said patent infringement action appealed from said decree to the United States Circuit Court in and for the Ninth Circuit, and which appeal remained pending until dismissed pursuant to said agreement of settlement dated August 18, 1934.

Following in the same paragraph, subdivision (9) sets forth a statement of the various litigation in which appellees embroiled appellants, or some of them, in an endeavor, as alleged in sub-paragraph (8) of sub-paragraph (g) (R. 64-65), and with the intent and purpose of harassing said Suckow and associates and financially destroying them and eliminating them and each of them from all activities in said borax business; and further, to compel said Suckow and his associates to turn over all of their ore to appellees, or those to be named by them, at a price and on a basis far below the real and true value of said assets desired to be acquired by the appellees.

There are seven different actions or proceedings set forth in such subparagraph (g) of the complaint, describing in particularity each one of them.

In the decision of the lower court it is said (R. 620), "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the anti-trust laws." The allegations of Paragraph 84 of the complaint (R. 65) completely refute and contravert such finding of the lower court. For the purpose of the present proceeding, the allegations of such Paragraph 84 are admitted by the appellees, and, in the face of such admission and also of Rule 8a, l. 1, there was no foundation or basis of any kind whatsoever for the above-referred-to portion of the decision of the lower court. Such Paragraph 84 is as follows:

84. That due to said bankruptcy proceedings and to each and every of said other activities of said defendants, or some of them, as herein set forth, and all pursuant to and in furtherance of said "General Conspiracy" referred to hereinabove, *said Suckow and said Suckow Company were destroyed financially and left without means or opportunity further to engage in the said borax business or any of its activities in any form whatsoever, and as a result thereof and by reason thereof, said Suckow was forced and compelled eventually to make and enter into an agreement or so-called settlement with defendant Pacific Coast Borax Company,* and which agreement was dated the 18th day of August, 1934 and made by and between John K. Suckow and Ruth E. Suckow, the wife of said John K. Suckow, as sellers and parties of the first part, and defendant Pacific Coast Borax Company, as buyer and party of the second part; that said agreement provided, among other things, that said Pacific Coast Borax Company should obtain another and more favorable lease upon said property of said Suckow Company from said bankruptcy trustee, and to which lease said Suckow Company would agree and become a party thereto as lessor. Furthermore, that said Suckow and/or said Suckow Company would convey, or cause to be conveyed, to said Pacific Coast Borax Company, four different parcels of real property, together with a quit-claim deed from said John K. Suckow and his said wife, Ruth E. Suckow, Mojave Borax Company, Ltd., and Suckow Borax Company, Ltd. to defendants United States Borax Company and BCL to certain other real property referred to in said agreement; that said Suckow and said Suckow Company should dismiss or cause to be dismissed all of his or its actions hereinabove referred to against defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., and United States Borax Company, and release all possible claims against said PCB, BCL and USB; in turn it was further provided that said Pacific Coast Borax Company should dismiss or cause to be dismissed all said actions against said Suckow and said Suckow Company, and pay said Suckow $150,000 in a certain manner and upon certain conditions set forth in said agreement, and further agreed to obtain a release of the said Gembo claim

and contract. That said lease referred to in said agreement provided that in compromise of Borax Consolidated, Ltd.'s alleged claim to 16,291 tons of ore and which represented one-half of the ore removed by Suckow or said Suckow Company from said property, said Borax Consolidated, Ltd. would be entitled to remove a tonnage equal to said tons previously removed by said Suckow or said Suckow Company, all without obligation therefor on the part of said Borax Consolidated, Ltd.; further, that said lease should cover a period commencing September 17, 1934 and ending September 17, 1944, with the right of said lessee to terminate said lease at lessee's option at any time subsequent to the first five years of said lease; furthermore, that said lessee therein named should not be required to mine said property and that no payment should be made for one half of the ore mined, and for the payment of minimum rentals graduated from $2500.00 per month during the first year up to $4,375.00 per month during the last year of said lease.

That neither said Suckow nor said Suckow Company would have made or entered into said agreement of August 18, 1934, except for the desperate financial condition in which he and it found themselves as a result of said activities, plans and schemes of said defendants, or some of them, and as outlined and set forth hereinabove.

Furthermore, at said time of making and entering into said agreement of August 18, 1934, neither plaintiffs nor said John K. Suckow, nor any of them, had any knowledge of any kind, nature or description whatsoever of said "General Conspiracy" referred to hereinabove nor of the violation by said defendants hereinabove alleged of said anti-trust laws of the United States, and said agreement of August 18, 1934 was made by said Suckow and his wife and said Suckow Company, and all things were done and performed as called for by said agreement by said Suckow and his said wife and said Suckow Company and required thereby to be done or performed, without knowledge of any kind whatsoever on the part of plaintiffs herein of said "General Conspiracy" or of the violation by said defendants of said Sections 1 and 2 of said Title 15. That none of said plaintiffs knew or became

aware of said violations by said defendants of Sections 1 and 2 of said Title 15, or of said "General Conspiracy," until on or about the fall of 1944 and subsequent to the commencement of an action by the United States versus certain defendants herein and filed in the United States District Court for the Northern District of California, Southern Division, on September 14, 1944, and numbered therein 23690-G; that on or about the said last named date, the United States Grand Jury for the said Northern District of California, Southern Division, found and returned an indictment against certain of the defendants herein, charging them with the violation of said anti-trust laws, particularly Sections 1 and 2 of said Title 15; that it was not until subsequent to the filing of said action by the said United States against said defendants herein and subsequent to the return of said indictment, that plaintiffs herein, or any of them, discovered the true facts of the situations presented herein or learned of said "General Conspiracy" referred to hereinabove, or of the fact that said defendants herein had violated said Sections 1 and 2 of said Title 15(a); that said action by the United States and said indictment are more particularly hereafter in this complaint described.

85. That in or about the spring of 1938, the said bankruptcy proceedings of SBM corporation were terminated and the property and assets of said corporation returned to said corporation by the trustee in bankruptcy and pursuant to the order of the said court therefor; that previously thereto, all of the debts of said SBM corporation had been paid, together with all of the administration expenses. During said bankruptcy, all income, except the approximate amount of $12,000, which was used to rehabilitate parts of the mining property according to said lease of September 17, 1934, had been used to pay off said bankruptcy creditors and administrative expenses.

86. Under the terms of said lease of September 17, 1934, said lessee therein, to-wit, said PCB, had the right to terminate said lease upon its option at any time subsequent to said September 17, 1939; that due to said provision, the said management of said SBM did not know, or could not ascertain, prior to the return of said SBM of its

said property and assets as aforesaid, whether or not said lease would be cancelled and said mine returned to it, or if said PCB would continue to operate under said lease. During said time in which said ore was not mined by said lessee, ore represented by prepaid royalties accrued to said lessee, and such fact, together with the right granted said lessee in said lease to remove ore from said mine at any time said lessee saw fit, put said property of said SBM in a most hazardous position.

87. That subsequent to the execution of said lease and the entering into possession of said property by said PCB, the said PCB operated said mine in an unminerlike, inefficient and incompetent manner, with the result that during the year 1937 a cave-in occurred on said property after a charge of dynamite had been set off at the termination of current mining operations at the end of a certain day. Said cave-in was purportedly not discovered until the following morning. Such cave-in occurred in that part of the mine in a northeasterly direction from the shaft which was in the line of the most probable continuance of the ore deposit itself. Said cave-in made it impossible for the officers of SBM to further evaluate the existing ore deposit correctly, since all passageways leading in said northeasterly direction were either destroyed by said cave-in or blocked by heavy cribbing installed by PCB; that said defendants attempted to convince said SBM that said cave-in was an act of God and endeavored to persuade and force said SBM to admit that such was a fact; whereas, in truth and in fact, said cave-in was the result of the negligence and carelessness of said PCB, and, as plaintiffs are informed and believe, and therefore allege, was purposely brought about in an endeavor to damage said mining property,—in the expectation, hope and desire that said plaintiffs herein would become discouraged and sell, or agree to sell, all of their interest or interests in said mining property at a price far below the real value; that said intent and purpose of said PCB was not discovered and known by said plaintiff until late in the fall of 1944.

88. That between the latter part of 1939 and the year 1942, said defendants, and particularly PCB and Ashburn, endeavored to persuade and/or force said SBM and said

Suckow either to agree to the execution of a new and substituted lease upon said property or to sell all the interests of said plaintiffs, or those then enjoying the ownership of said property, to said defendants, particularly, said PCB; *and to such end and with such intended purpose, said defendants threatened or charged, and did, among other things, the following, to-wit:*

(a) Threatened that if said SBM would not lease again and/or sell all of its interest in said property covered by said lease to said PCB, the latter company would totally exhaust the said property by mining all the ore for which it had prepaid royalty from the uncaved accessible part of said mine.

(b) That during said time, said PCB, then owning certain adjoining property of a similar character on said Section 23, mined ore from the said property on said Section 23 and removed it through the shaft upon said property covered by said lease, all without right so to do and in contravention of the terms and provisions of said lease; that said Suckow and said SBM protested said actions on the part of said PCB and said protests were unheeded and defied by said PCB.

(c) That at various times during said period, the exact dates of which being to plaintiffs at this time unknown, defendants PCB and Ashburn advised SBM that if and when said lease was terminated, and notwithstanding the clause in said lease for the return and re-delivery of said mining property to said SBM, said defendants would not return or re-deliver or remove from said property, upon the false and fraudulent claim that at the time the order for joint operation of said property was made and the price of $21.89 per ton was established as aforesaid, the court in establishing said order took into consideration the question of depletion and depreciation, and that by reason thereof said defendants became part owners of the depleted and depreciated mining property; that said claim was false and untrue and made for the purpose of harassing and disturbing plaintiffs, particularly said SBM.

(d) Sometime subsequent to said cave-in on the main level of said mine, defendant PCB commenced to mine the second level of said mine, such being a deposit approxi-

mately 12 feet under the upper strata of said mine, and in the further attempt to ruin said property, mined said lower level in a careless, unminerlike and unworkmanlike manner, using timber of low grade in the performance of such work. The structure of the ore body had become weakened by the water which was not disposed of properly and which entered the lower level, causing said mine wall to bulge at the floor, with the result that a new cave-in occurred on said lower level under and beneath the caved-in area of the main level.

(e) By this time, to-wit, December, 1942, and due to the said harassments of said defendants and many other similar instances too numerous to herein set forth, said officers of said SBM became discouraged and feared that they and said SBM would become unable to cope with the prospective legal entanglements brought about and threatened by said PCB and others of said defendants; said defendants, all of whom were well aware of such condition of SBM, renewed their endeavors to secure a new and more favorable lease on said mining property, or, in lieu thereof, to compel plaintiffs to consent to the sale of said mining property by said SBM. Said activities of defendants continued from and through the year 1939 to the end of 1942. Notwithstanding said activities of said defendants, said SBM prepared for the resumption of mining said mine upon the expiration of said lease held by said PCB, and in this connection purchased certain necessary machinery, with the intent and purpose of operating said mine to its utmost upon the termination of said lease; but said persecutions by said defendants of said plaintiffs continued, with the result that in 1942,—and due to the threats of defendants—said SBM entered into negotiations with said defendants for the execution of a new lease and which negotiations continued over a period of many months, during which said defendants endeavored in every way possible to force said SBM to the execution of a lease embodying terms of great disadvantage to said SBM; that ultimately said plaintiffs refused to enter into any such lease as suggested by defendants, with the result that ultimately, and due to the past experience of plaintiffs with said defendants and their manner of operating said mining property and their many

other persecutions of plaintiffs and the threats not to surrender the property to said SBM on the expiration of said lease, and due, among other things, to the fact that all of the former customers of said SBM in England and Holland had been taken over by defendants and many of the refineries on the European Continent using row or calcined ore had discontinued their operations for lack of such ore, and the further fact that all of the former European markets of said SBM had been lost through the activities of defendants, or some of them, said plaintiffs consented that said SBM sell, and said SBM did sell, to defendant Borax Consolidated, Ltd. its interests in and to the following described property: (Here follows a description of the property involved.)

And also consented to the surrender by said PCB of said lease dated September 17, 1934 and to the release by said SBM to PCB of any and all obligations to perform any of the terms of said lease, and, in addition, consented to the release of any and all claims, demands and causes of action whatsoever not arising out of or under said agreement of sale; and also that said SBM should execute a bill of sale to said PCB to all of the personal property described in said Schedule A attached to said lease dated September 17, 1934, between SBM and Hubert F. Laugharn, trustee in bankruptcy, as lessors, and PCB as lessee—all for the sum of $350,000; that said sales were consummated during the month of December, 1942, pursuant to the foregoing terms.

89. That neither plaintiffs nor any of them had at the time of said agreement of August, 1934, and hereinabove described, or at the time of said sales of December, 1942, any knowledge, intimation, or cause to believe that said "General Conspiracy" hereinabove described existed, or that defendants had specifically and pursuant to said General Conspiracy planned the financial and other destruction of said Suckow and said SBM; that said "General Conspiracy" was at all times fraudulently and otherwise concealed from plaintiffs by defendants; that said plaintiffs did not discover the existence of said "General Conspiracy" or said plan to destroy said Suckow or said SBM until subsequent to September, 1944, at which

time the United States Government brought an action in the United States District Court, in and for the Northern District of California, against certain defendants herein, pursuant to the anti-trust laws of the United States, and which action was entitled "In the District Court of the United States, for the Northern District of California, Southern Division, United States of America, Plaintiff, versus Borax Consolidated, Ltd., Pacific Coast Borax Company; United States Borax Company; American Potash & Chemical Corporation; Borax & Chemicals, Ltd.; Three Elephant Borax Corporation; Goldfields American Development Company; F. A. Lesser; James Gerstley; Frank M. Jenifer; James M. Gerstley; Frank T. Winters; C. R. Dudley; F. C. Baker; William J. Hatchley; Frederick Viewig; W. J. Murphy; Robert M. Curts, Defendants, Civil Action No. 23690-G, and at said time and on or about the 14th day of September, 1944, secured an indictment for violation of said anti-trust laws against said Borax Consolidated, Ltd., said Pacific Coast Borax Company, said United States Borax Company, said American Potash & Chemical Corporation, Borax & Chemicals, Ltd., and other defendants, which indictment was filed in the said United States District Court, for the Northern District of California, Southern Division, on the 14th day of September, 1944, and is numbered 28900-S, all as hereinabove in this complaint alleged.

90. That had plaintiffs known of or discovered, or could have discovered, that said conspiracy existed, they would not have made or entered into said agreement of August, 1934, nor said new lease of September 17, 1934, both hereinabove referred to, nor would they have made or entered into said sales and agreements of December, 1942.

91. That said "General Conspiracy" was a fraud upon plaintiffs and each of them, and was at the time of its said formation and continually thereafter intended as and for the purpose of destroying said plaintiffs and each of them and their and each of their businesses and business, as herein in this complaint set forth, and continued with such fraud and with such intent against and upon plaintiffs, and each of them, until the discovery of

said conspiracy as aforesaid by said plaintiffs; that said "General Conspiracy" was fraudulently concealed by said defendants from plaintiffs and each of them until the time of discovery thereof as aforesaid by plaintiffs.

92. That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said "General Conspiracy," plan and combination hereinbefore in this complaint set forth and described, and with the intent and purpose of controlling and dominating throughout the world and in interstate commerce the mining, production and sale of borax, and with the intent and purpose of destroying plaintiffs' activities, as herein set forth, and removing plaintiffs, and each of them, as a competitor of defendants, or some of them, in the said mining, production and sale of borax.

93. That said "General Conspiracy" complained of and hereinbefore set forth in this complaint, was a continuing conspiracy, and each separate thing and act alleged herein and performed by the defendants, or some of them, or any of them, have been, and were, acts, things and combinations contributing to and forming a part and overt act of said continuing conspiracy.

94. That due to said intents, purposes and acts of said defendants, or each of some of them, as herein set forth, plaintiffs have been damaged in the sum of Five Million Dollars ($5,000,000), no part of which has been paid to plaintiffs or any of them, except the sum of Five Hundred Thousand Dollars ($500,000).

The allegations of the foregoing paragraphs, all admitted by appellees, completely refute the statement contained in the decision of the lower court to the effect that "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the anti-trust law" (R. 620); also, the statement that "There is no allegation of damages suffered or injuries received by the plaintiffs." (R. 620). To the contrary, the complaint shows that appellants walked into a trap, the character of which, its purpose, and by whom set were not disclosed until long afterward. A conspiracy is always a conspiracy to do something; that something is the

thing which gives legal character—here it is to commit a fraud and to destroy appellants financially. Here, the complaint tells the story—the history and background of the borax industry—the desire and plan of appellees to secure the control thereof—the activities and endeavors of appellants to engage in such operations—the plan and conspiracy of appellees to destroy appellants financially and to eliminate them from any activity or competition in the borax industry—the acts used and performed by appellees pursuant to such interest and conspiracy—the extent and nature of the injuries suffered by appellants as a result of such activities and the damages suffered by them. It would be difficult to find in any reported case of treble damage actions under the Antitrust laws a more vicious, venal and fraudulent course of conduct than that set forth in the present complaint, all of which, may it please Your Honors, appellees have the audacity and abandon to admit. Honorable and decent business men if charged with the acts herein presented against them would rush to their defense with denials of such charges instead of indulging in legal quibbles and objections, even though the law does give them to right so to do. They are willing to be charged with anything, no matter how corrupt or wicked, and to admit the same if they can escape by hiding in the technical robes that sometimes are worn by Justice.

MOTIONS OF DEFENDANTS TO DISMISS AND FOR SUMMARY JUDGMENT

To the complaint, the appellees all filed motions to dismiss and for summary judgment, that of American Potash & Chemical Corporation appearing at R. 441-445. Similar motions of appellee Pacific Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer and James M. Gerstley appear in the Record at pages 452-461. Like motions of appellee West End Chemical Company appear in the record at pages 461, et seq. Appellee Stauffer Chemical Company filed like motions. Attached to the motions of appellee Pacific Coast Borax Com-

pany and others are long affidavits of various parties, together with photostatic copies of various documents. All of such motions also plead the Statute of Limitations—Sec. 338 of the California Code of Civil Procedure, subdivision 4 thereof, also subdivision 1 of Sec. 338 of such Code of Civil Procedure.

To these various affidavits and exhibits, appellants filed reply affidavits of Frank Buren (R. 602), Paul O. Tobeler (R. 466) and Frank Buren (R. 570).

The cause was heard on such complaint, such motions and the affidavits attached thereto, and after voluminous briefs and oral argument, the matter was submitted to the Court, which, on November 22, 1948, granted the motions of appellees to dismiss and ordered "that the motion of the defendants to dismiss the complaint for failure to state a claim upon which relief may be granted be and the same hereby is Granted and said complaint is hereby Dismissed." This order and judgment was filed in the office of the Clerk on November 22, 1948 and entered in the Civil Docket, November 24, 1948 (R. 621), thus giving it the effect of a judgment. Subsequent thereto, and on December 2, 1948, appellants filed a motion for an order altering or amending the judgment of dismissal theretofore filed upon the 22nd day of November, 1948, by striking therefrom the last two paragraphs of said judgment and inserting in lieu thereof the following (R. 621-622):

> "It is hereby ordered that plaintiffs above named, may, if they so elect, move this Court for an order permitting them to amend their complaint on file herein, said motion, if any, to be made on or before ten (10) days from the date of this order permitting the filing of such motion to amend."

Under date of December 17, 1948, the lower court made its order denying the motion to amend or alter judgment, in the following order (R. 623):

> "It is Ordered that the plaintiffs' motion to amend or alter the judgment entered herein on November 24, 1948, be and the same hereby is Denied."

Statement of Points upon Which Appellants Intend to Rely on the Appeal Taken from the Order Granting the Motion to Dismiss and from the Judgment Entered in the Above Entitled Action, and from the Order Denying the Motion of Plaintiffs to Amend or Alter the Judgment Entered. (R. 629-632)

"Now come plaintiffs above named and, pursuant to the Federal Rules of Civil Procedure, set forth a statement of the points upon which appellants intend to rely upon appeal, as follows:

1. The District Court erred in granting the motions of appellees, above named, to dismiss the complaint of appellants as amended, and which order was filed herein upon the 22nd day of November, 1948.

2. The District Court erred in granting the motion of said appellees for a summary judgment, and which order was filed herein upon the 22nd day of November, 1948.

3. The District Court erred in making its order filed herein on November 22, 1948 and dismissing the complaint of plaintiffs and appellants for failure to state a claim upon which relief may be granted.

4. The District Court erred in making its order denying the motion of plaintiffs and appellants to amend or alter the judgment entered herein, and which order denying said motion was filed herein on December 17, 1948.

5. The District Court erred in failing to deny the motions of defendants and appellees, and each of them, to dismiss and for summary judgment and filed herein by said appellees, and each of them.

6. The District Court erred in the following particulars: In holding:

(a) That this is an action at law.

(b) That this is not a suit in equity.

(c) That the State Statute of Limitations applies.

(d) That the damages alleged are the gravamen of the action and not the conspiracy.

(e) That the conspiracy charged upon is not the gravamen of the action.

(f) That the Statute of Limitations runs from the date when the injury was inflicted and the damages suffered.

(g) That the Statute of Limitations does not run from the last overt act performed pursuant to the conspiracy.

(h) That fraud upon appellants was not shown on the face of the complaint.

(i) That the allegations of the complaint, not specifically denied by appellees, were not admitted by them and, therefore, do not stand as admitted facts against them.

(j) In failing to hold that upon this motion to dismiss and for summary judgment, the allegations of the complaint properly pleaded stand admitted by appellees.

(k) That the Record establishes the fact that appellants knew, or had reason to believe, that the acts of appellees which caused the claimed damages were a violation of the Anti-Trust Laws.

(l) That "belief" or "suspicion" on the part of appellants constituted discovery or knowledge.

(m) That the complaint herein fails to allege affirmatively any injuries suffered by appellants by reason of appellees' violations of the Anti-Trust Laws.

(n) That in every transaction with appellees, the appellants received consideration or any adjudication of their rights by a court having jurisdiction.

(o) That on the face of the complaint, the price received by appellants does not appear to be inadequate consideration, and further, that the complaint fails to show affirmatively injuries to appellants' business or property for any of the transactions or events delineated.

(p) In failing to hold that the conspiracy charged was a continuing conspiracy.

(q) In failing to hold that the moratorium of 1942 and the extensions thereof tolled the statute of limitations pleaded by appellees.

(r) In failing to find that the cause of action alleged in the complaint, or some part thereof, was not barred by the Statute of Limitations.

(s) In failing to hold that the complaint on its face showed that appellees were guilty of fraud and the concealment thereof, against and from appellants.

7. The District Court erred in not granting appellants' motion to amend or alter the judgment ordered and/or entered herein upon the 22nd day of November, 1948, in the manner requested by appellants.

8. The District Court erred in granting judgment for appellees in accordance with the Judgment entered herein on the 20th day of December, 1948.

9. All of the points in the foregoing statement apply to all, each and every of the appeals referred to in the Notice of Appeal heretofore filed by appellants herein on the 20th day of December, 1948."

A statement of points to be relied upon by appellants and designation of parts of Record to be printed, was filed in the United States Court of Appeals on January 26, 1949, and is as follows (R. 669-671):

"Appellants adopt as the statement of points upon which they intend to rely upon this appeal, the Statement of Points filed by them in the above-entitled action in the United States District Court, for the Northern District of California, Southern Division, upon December 21, 1948, and in addition thereto designate the following points:

"10. All statutes of limitations urged by appellees herein were tolled by the Act of the 77th Congress, 2nd Session, Chapter 589, 56 Stat. 781 and adopted upon October 10, 1942, and which Act was subsequently and upon the 30th day of July, 1945, extended to the 30th day of July, 1946.

"11. That if the said Moratorium Act referred to hereinabove did not apply to all of the damages claimed and to the overt acts of appellees, all as alleged in the complaint on file herein, it did apply to the overt acts surrounding the sale of December, 1942, referred to in the complaint on file herein.

"And appellants designate that there be printed the following parts of the Record now on file herein, to-wit:

Complaint

First Amendment to Complaint

Affidavit of Paul O. Tobeler and 17 Exhibits

Affidavit of Frank Buren in Opposition to Motion to Dismiss

Supplemental Affidavit of Frank Buren in Opposition to Motion to Dismiss

Memorandum Opinion

Notice of Motion to Alter or Amend Judgment of Dismissal Heretofore Entered Herein upon November 22, 1948

Order Denying Motion to Amend or Alter Judgment

Judgment

Notice of Appeal

Cost Bond on Appeal

Statement of Points upon Which Appellants Intend to Rely on Appeal

Designation by Appellants of Contents of Record on Appeal

This Statement of Points and Designation."

ADMISSIONS OF APPELLEES

On the Record, appellees, among other admissions, have admitted the following:

1. The historical background of the borax industry as alleged in the complaint.

2. That appellees, up to 1944, were engaged in the conspiracies and combinations charged, and pursuant thereto committed the offenses charged in paragraphs 64, 65 and 66 of the complaint and hereinabove set forth. The admissions of these facts are sufficient in themselves to condemn appellees and convict them of the charges made against them by appellants. They admit the allegation of paragraph 64 that they monopolized the industry in violation of the Anti-Trust Law, and that, pursuant to such violation, did the things and performed the acts set forth in paragraph 65.

3. They admit the formation of the 1929 agreement and conspiracy (paragraph 69 as amended), and the extension and continuations thereof as charged, as well as the purpose of such agreement to eliminate competition and destroy those in competition with them, including appellants.

4. They admit the allegations of paragraph 70, 71, 72, and 73 as amended. Paragraph 73 as amended charges directly:

> 73. That as a part of said 1929 agreement, said defendants agreed specifically among themselves to destroy and

eliminate the said John K. Suckow and each and all of his companies and associates from all operations of every kind and involving the production, distribution or sale of borax or any of its products.

These admitted activities on the part of the appellees constituted a fraud upon Suckow and his associates, for a conspiracy to destroy an individual is a fraud upon him.

5. They admit that as early as 1918-1922, they were committing frauds upon Dr. Suckow and concealing from him their discovery of sodium borate—the more valuable of the minerals involved—and which information they were bound to disclose to Dr. Suckow; paragraph 79 of the complaint relates in particularity the commencement of activities between Suckow and certain of the appellees during the period involved. Paragraph 80 sets forth an agreement entered into between certain of the appellees and Suckow who were jointly engaged in certain operations; pursuant thereto, certain drilling was carried on by certain appellees upon a portion of the property and formed the basis of certain patents which were obtained in the name of the appellees in question. Then paragraph 80 goes on to allege:

> All of said patents were obtained on the discovery of colemanite by drilling, *and it was not known to said Suckow,—and the fact thereof was concealed by defendants from said Suckow at said time—that more valuable deposits of sodium borate actually underlaid the colemanite.*

This fraud stands admitted by appellees and confirms the charge made by appellants of the fraudulent intents and activities of appellees throughout the complaint and the period covered thereby.

6. They admit the allegations of paragraph 82 and of their activities to destroy the Gembo contracts secured by Suckow for the sale of borax in Europe.

7. Next they admit the performance of all of the overt acts set forth and charged in paragraph 83 and to which paragraph

and the overt acts set forth therein we respectfully refer and request the attention of this Court thereto. We respectfully submit that the charges in such paragraph set forth make the blood of any honest American citizen endeavoring to carry on his individual business operations, boil with indignation and resentment—particularly is this so of the allegations of subdivision (c) of such paragraph 83, wherein is set forth the story of the petition for involuntary bankruptcy—engineered by certain of the appellees against Dr. Suckow's company. These allegations, all admitted by appellees for the purposes of their motions, followed by the allegations of the remaining subdivisions of paragraph 83, are enough in themselves to prove the many frauds of appellees and their violation of the Anti-Trust Laws and the charge of appellants that by reason thereof they were damaged and practically eliminated from their borax operations.

8. They admit the allegations of paragraph 84 that due to such bankruptcy proceedings and their other activities, Suckow and his company were destroyed financially and left without means or opportunity further to engage in the borax business or any of its activities, and as a result and by reason thereof, Suckow was forced and compelled eventually to make and enter into the so-called Settlement Agreement of August, 1934, referred to in such paragraph 84, and by which Suckow was forced to give up valuable interests he then possessed.

9. In such paragraph 84, appellants allege that neither Suckow nor his company would have made or entered into such agreement of August, 1934, except for the desperate financial condition in which they found themselves as a result of the activities of appellees and as set forth in such paragraph; they further admit that at the time of making said agreement of August, 1934, neither the appellants nor Suckow had any knowledge of the said "General Conspiracy" of 1929 or of the violation by appellees of the Anti-Trust Law, and further admit the allegations of paragraph 90 of the complaint, as follows:

90. That had plaintiffs known or discovered, or could

have discovered, that said conspiracy existed, they would not have made or entered into said agreement of August, 1934, nor said new lease of September 17, 1934, both hereinabove referred to, nor would they have made or entered into said sales and agreements of December, 1942.

10. Commencing with paragraph 88, appellees admit that between the years 1939 and 1942, they threatened or charged, and did, among other things, the acts set forth in subdivisions (a) to (e) of paragraph 88 of the complaint, to which we respectfully refer, and which led up to the sale by the Suckows in 1942 referred to in subdivision (2) of said paragraph.

11. They admit the allegations of paragraph 93 to the effect that the "General Conspiracy" was a continuing conspiracy and that all of the acts of appellees, and alleged in the complaint, contributed to and formed a part of such continuing conspiracy.

12. They also admit the allegations of paragraph 94 that due to such activities on their part, appellants have been damaged in the sum of Five Million Dollars, no part of which has been paid.

In the face of such admissions as to damages, it is difficult to understand how the lower court could have held that, "There is no allegation of damages suffered or injuries received by the plaintiffs" (R. 620), or that, "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violation of the Anti-Trust Law." (R. 620).

In view of the foregoing, and the allegations of the complaint referred to and described hereinabove and the Overt Acts particularly set forth—all admitted by appellees—it is also difficult to ascertain what the lower court meant when it stated in its decision (R. 620):

> "A mere claim of damages by reason of the existence of a conspiracy is not sufficient to state a cause of action, for a plaintiff must have received some injury in order to be able to sue under the Anti-Trust Laws. Gibbs v. McNeeley, 102 F. 594; Noyes v. Parson, 245 F. 689."

Here, there is not only *claim* for damages, but an *admission* thereof upon the part of appellees.

As a matter of fact, the lower court seemed to lose all sight of the admissions made by appellees of the allegations of the complaint and passed on the questions presented as a trial court would have done had the cause been actually tried on the merits. Also, as we shall elsewhere show, the lower court overlooked entirely the fact that upon a Motion to Dismiss or for a Summary Judgment, *facts* cannot be tried, and that as soon as it appears on the hearing of such motions that the questions presented by such motions involve *facts,* it is the duty of the hearing court to deny immediately such motions. *Sprague v. Vogt,* 150 F.(2) 795 (8th Cir.), particularly page 800; also,

Detsch & Co. v. American Products Co., 152 F.(2) 473 (9th Cir.), Sub. 6.

ARGUMENT

I.

We shall first discuss the following designations of error under this heading I of the Argument:

1. The District Court erred in granting the motions of appellees, above named, to dismiss the complaint of appellants as amended, and which order was filed herein upon the 22nd day of November, 1948.

2. The District Court erred in granting the motion of said appellees for a summary judgment, and which order was filed herein upon the 22nd day of November, 1948.

3. The District Court erred in making its order filed herein on November 22, 1948, and dismissing the complaint of plaintiffs and appellants for failure to state a claim upon which relief may be granted.

5. The District Court erred in failing to deny the motions of defendants and appellees, and each of them, to dismiss and for summary judgment and filed herein by said appellees and each of them.

A. THE COMPLAINT STATED A CAUSE OF ACTION FOR VIOLATION OF THE ANTI-TRUST LAW.

Section 1 of Title 15 provides in part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 2 provides in part as follows:

> "Every person who shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

The facts set forth in the complaint describe the combinations and conspiracies that existed and which were prohibited by both sections quoted above. Not only are the activities of appellees described as combinations and conspiracies, but specific facts are set forth which in themselves prove the combinations and the conspiracies and the intent of appellees to violate the law.

It will be recalled that, for the purposes of this action and the present proceeding, such allegations are admitted by appellees.

Section 15 of 15 U.S.C. is the provision which gives to appellants their cause of action by reason of such violations and activities by and on the part of the appellees. Such section provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold damages by him sustained, and the costs of suit, including reasonable attorneys' fee."

Again, the complaint alleges facts and specific instances demonstrating that appellants are brought within such section

15 by the activities of appellees. They show the injuries suffered by appellants as a result of appellees' activities, and which allegations and injuries are admitted by appellees.

It is submitted that the complaint is sufficient and within the rules laid down in the following cases, to wit:

Stevens Co. v. Foster & Kleiser, Etc., 311 U.S. 255, 61 S.Ct. 210.

This was a triple damage action for violation of the antitrust law. The question of the sufficiency of the complaint arose, and on page 261 of the Official Report, the court said:

> "The complaint adequately charges a conspiracy to restrain the transportation of posters in interstate commerce, in aid of the attempted monopoly. It also charges other means and acts, local in character, with the same aim. The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented petitioner from establishing a business in San Francisco, 'all to the great injury and damage of plaintiff.' The pleading further alleges that the respondents' acts were injurious to the petitioner, excluded petitioner from fair competition, and charges that because of petitioner's inability to compete with respondents, petitioner 'has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby.'
>
> **"While these allegations are general, we cannot say that they are inadequate nor are we able to agree with the court below that they are coupled with and treated solely as the consequence of local activities of the respondents."**

In *Publicity Building, Etc. v. Hannegan,* 139 F.(2) 583 (Eighth Cir.), the court said:

> "A motion to dismiss a complaint should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

"Federal Rules of Civil Procedure do not sanction disposition of doubtful issues of fact or law upon motions to dismiss for insufficiency of pleadings, but the Rules contemplate a determination of all such issues by district court after a hearing. Federal Rules of Civil Procedure, rule 1 et seq., 28 U.S.C.A. following section 723c."

On pages 586 and 587 the court discusses these questions in detail.

In *United States v. Standard Oil, Etc.*, 7 F.R.D. 338 (S.D. Cal.), Judge Yankwich stated (p. 340) as follows:

> *"The courts have always recognized the difficulty in actions of the character here, inherent in the nature of the case, in setting forth in precise detail the acts constituting the alleged violations of the anti-trust laws.* Loewe v. Lawlor, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488, 13 Ann. Cas. 815; Swift & Co. v. United States, 196 U.S. 375, 395, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518; Buckeye Powder Co. v. E. I. Du Pont de Nemours Co., D.C., 196 F. 514. *And since the adoption of the Rules of Civil Procedure, the cases require of the pleader only a plain and simple statement of his case in conformity to Rule 8(a), 28 U.S.C.A. following section 723c. It is not necessary to set out in detail the acts complained of nor the circumstances from which the pleader draws his conclusions that violations of the acts of Congress have occurred and the pleader has been damaged."* (Emphasis added).

We respectfully submit that the foregoing refutes completely the suggestions of the lower court that the complaint here does not state a cause of action.

B. THE MOTIONS FILED BY APPELLEES AND THE AFFIDAVITS ACCOMPANYING THE SAME AND PRESENTED IN SUPPORT THEREOF RAISE QUESTIONS OF FACT WHICH UPON BECOMING APPARENT REQUIRED THE LOWER COURT TO DENY SUCH MOTIONS AND AFTER THE FILING OF ANSWERS BY APPELLEES TO SET THE CAUSE FOR TRIAL UPON THE MERITS. INSTEAD OF SO RULING AS REQUIRED BY THE AUTHORITIES HEREINAFTER SET FORTH, THE LOWER COURT PRESUMED TO RULE AND PASS UPON THE QUESTIONS OF FACT RAISED BY SUCH AFFIDAVITS ACCOMPANYING THE MOTIONS TO DISMISS AND THE COMPLAINT AND AFFIDAVITS OF APPELLEES.

The Motions to Dismiss Admitted All of the Allegations of the Complaint Well Pleaded

Purity Cheese Co. v. Frank Ryser Co., 153 F.(2), 88 (7th Cir.);

United States v. Frankfort, Etc., 324 U.S. 293, 65 S.Ct. 661;

Ansehl v. Puritan, Etc., 61 F.(2), 131 (8th Cir.);

Ledbetter v. Farmers, Etc., 142 F.(2) 147 (4th Cir.), Cert. den., 323 U.S. 719;

Willson v. Graphol Products Co., 165 F.(2) 446.

Furthermore, affidavits filed in support of a motion to dismiss or for summary judgment, cannot be used to contradict the allegations of the complaint.

Domestic & Foreign Commerce Corp. v. Littlejohn, (D.C. Cir.), 165 F.(2), 235, at 237;

Michel v. Meier, 8 F.R.D. 464;

Frederick Hart & Co. v. Recordgraph Corp., (Third Cir.), 169 F.(2), 580.

In such case the Court stated (p. 581):

> "We are of the opinion that the District Court erred. It is well-settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of *ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue.* **An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to**

well-pleaded facts in the complaint. Farrall v. District of Columbia Amateur Athletic Union, 1946, 80 U.S. App. D.C. 396, 153 F.2d 647; United States v. Association of American Railroads, D.C. Neb. 1945, 4 F.R.D. 510; 2 Moore's Federal Practice (2nd ed. 1948) pages 2254, 2255."

Appellees' affidavits in support of the motions to dismiss and for summary judgment allege that the action was barred by the Statute of Limitations, and also that the causes of action were settled and released. See motions to dismiss, R. 452, et seq. The affidavits and purported releases (R. 459) filed in connection with such motions attempt to set forth facts which appellees claim demonstrate that appellants had knowledge of these activities of appellees, as set forth and admitted, long prior to the commencement of this action. (Affidavit of Moses Lasky and exhibits attached, R. 130; also affidavit of Ashburn, R. 83, and affidavit of Bargion, R. 100). To these, appellants filed the affidavit of Frank Buren (R. 570 and 602) and of Paul O. Tobeler (R. 46). To all of these affidavits were attached exhibits forming a part of the same.

Appellants allege in paragraphs 89 to 90, inclusive (R. 75-77), that they had no knowledge of such General Conspiracy or that the activities of appellees—and alleged in the complaint—were a part of and due to such General Conspiracy, until the fall of 1944 when the Government secured its indictment and brought its action, and that they would not have entered into the agreement of August, 1934, nor the sales agreement of December, 1942, had they known that the acts charged in the complaint were a part of and due to such General Conspiracy. It was with the idea of denying such allegations of appellants that the exhibits were attached to the motions to dismiss and for summary judgment. By reason thereof, questions of fact were immediately brought into being, namely (a) whether or not appellants knew of the formation of such General Conspiracy prior to the action of the Government in 1944; (b) if so, when was such discovery made; (c) whether or not appellants would have

entered into the agreement of August, 1934, or the sale of December, 1942, had they known the facts alleged; (d) whether or not appellants were damaged by the activities of appellees, as alleged in the complaint and admitted by appellees; (e) whether or not such General Conspiracy was a fraud upon appellants, as charged in paragraph 91 (R. 77); (f) whether or not such General Conspiracy was a continuing conspiracy, as alleged in paragraph 93 (R. 78) and admitted by appellees; (g) whether or not appellants were damaged in the manner and as a result of the activities of appellees and as alleged in paragraph 94 (R. 78); (h) and, whether or not appellants knew or became aware, prior to the fall of 1944, of the fact that appellees had become or were violators of the antitrust laws, and if so, upon what date. Such discovery was made by appellants; (i) and, when or upon what date the Statute of Limitations began to run against appellants on this present complaint or the cause of action set forth therein. See last paragraph of the *Hart* case cited infra (169 F.(2) 580) and appearing on p. 583 and which is on all fours with the present case.

Here, instead of denying the motions to dismiss and for summary judgment, as required by law, the lower court accepted questions of fact tendered by appellees in their motions and affidavits and passed upon certain of such questions of fact in the following particulars. In the lower court's decision (R. 619) it is stated:

> "Too, *the record seems to firmly establish the fact* that plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-Trust Laws. Such fact precludes plaintiffs from availing themselves of this exception which would toll the statute of limitations until the alleged date of discovery in 1944." (Italics ours)

Note, please, that the lower court fails to find or state the date upon which such discovery was made by appellants and in the absence of such finding how can it be determined when the statute commenced to run?

Such quotation is a direct finding of fact as to knowledge on the part of appellants, which was derived by the court solely from the allegations of the complaint and the affidavits and exhibits of appellees. This question could only properly be presented upon a trial of the cause upon the merits. Instead, the court took the question over for its own decision, without witnesses or benefit of cross-examination or presentation of evidence by or on behalf of appellants—all contrary to the authorities hereinafter set forth.

The decision also holds (R. 619):

> "Apart from such bar however, no cause of action is stated by any of the claims made by the plaintiffs, including any claim with respect to the transaction of 1942."

The bar referred to is that of the Statute of Limitations. How could the court make such a finding in the face of the admissions of appellees and without the opportunity to appellants to present evidence?

Further, at R. 620, the decision continues and states:

> "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the Anti-Trust Laws. **In every transaction with the defendants the plaintiffs have received consideration or an adjudication *of their rights by a court having jurisdiction.*"** (Emphasis ours)

The underlined portion of the above quotation is a direct finding of fact, as fully as though such finding was made after a trial upon the merits.

Continuing, the decision states (R. 620):

> "There is no allegation of damages suffered or injuries received by the plaintiffs. **On the face of the complaint, the price received by the plaintiffs does not appear to be inadequate consideration.**"

No more complete finding of fact could be conceived than the last sentence of the foregoing quotation. On the face of the

record, how could the court possibly have made such a finding of fact?

This Court has passed directly upon such a situation in the case of *Detsch & Co. v. American Products Co.,* 152 F.(2) 473, where it was held (subdivision 6):

> "In action for breach of written agency contract requiring manufacturer to 'cooperate' with agency to further sales of manufacturer's products, summary judgment dismissing complaint alleging manufacturer's breach of contemporaneous oral agreement to establish warehouses cannot be supported because of letters which at most show considerable volume of business built up by agency in manufacturer's products, that warehousing is not discussed until over a year after making of contract, and that jury may infer that warehousing agreement has not been made. Federal Rules of Civil Procedure, rule 8 (f), 28 U.S.C.A. following section 723."

The concluding sentence of the Opinion at page 475 is as follows:

> "Appellant is entitled to a trial in which the witnesses, before the jury or court, if any, shall be subject to cross-examination and to the usual inferences from their demeanor and manner of testifying."

In *Sprague v. Vogt* (8th Cir.), 150 F.(2) 795, at page 800, it is held:

> "This court has stated the substance and purport and effect of Rule 56 (c), F.R.C.P., in Walling v. Fairmont Creamery Co., 139 F.(2d) 318, 322, as follows:
>
> 'Rule 56(c) of the Rules of Civil Procedure provides that a summary judgment shall be granted "if the pleadings, depositions and admission on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions,

if any, are carefully scrutinized by the court. The object of the motion is to separate the formal from the substantial issues raised by the pleadings, **and the court examines evidence on the motion, not to decide any issue of fact which may be presented, but to discover if any real issue exists.** Toebelman, et al. v. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F.2d 1016, 1018. When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence, and must not only be made on the personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted. *When written documents are relied on, they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient.* Rule 56(e), Rules of Civil Procedure; 3 Moore's Federal Procedure under the New Rules, p. 3175, et seq. **On an appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt.** Ramsourer v. Midland Valley R. Co., D.C., 44 F. Supp. 523, 526; Weisser et al. v. Mursan Shoe Corporation, et al., 2 Cir., 127 F.2d 344, 346 (145 A.L.R. 467); McElwain v. Wickwire-Spencer Steel Co., 2 Cir., 126 F.2d 210.'

The rule applicable hereto was laid down by the Supreme Court in *Sartor v. Arkansas Natural Gas Corporation,* 321 U.S. 620, 64 S.Ct. 724. It is there held (at page 725):

> "Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and no genuine issue remains for trial. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A., following Section 723c."
>
> "The credibility of witnesses and weight to be given their testimony is for jury which may exercise its independent judgment even if such testimony is uncontradicted."

The rule is so well stated in *Newark Evening News v. King Features,* 7 F.R.D., 645, that we quote subdivisions 1 and 2 of such Opinion, at pages 646 and 647. The Court stated:

"Rule 56 of the Rules of Civil Procedure, *supra*, does not vest in the court the jurisdiction to summarily try the factual issues on the pleadings and affidavits of the parties, but vests in the court the limited authority to enter summary judgment only if it clearly appears from the record that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The complete absence of any genuine issue of fact must be apparent and all doubts thereon must be resolved against the moving party. Fishman v. Teter, 7 Cir., 133 F.2d 222; Toebelman v. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F.2d 1016; McElwain v. Wickwire Spencer Steel Co., 2 Cir., 126 F.2d 210; Miller v. Miller, App. D.C., 122 F.2d 209; Whitaker v. Coleman, 5 Cir., 115 F.2d 305. See also Sarnoff v. Ciaglia, 165 F.2d 167, recently decided by the United States Circuit Court of Appeals for the Third Circuit. **If it appears from the record that there is a genuine issue of fact, even though it may relate only to the credibility and the weight of the testimony, the court is without jurisdiction to enter summary judgment.** Sartor v. Arkansas Gas Corporation, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967; Arnstein v. Porter, 2 Cir., 154 F.2d 464."

In

Domestic & Foreign Commerce Corp. v. Littlejohn, 165 F.2d 235,

it was said (p. 237):

"* * * The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F.2d 865. *The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled.*" (Italics ours.)

Also see

Willson v. Graphol Products Co., 165 F.2d 446;
Ledbetter v. Farmers, Etc., 142 F.2d 147 (4th Cir.) Cert. denied; 323 U.S. 719.

In the *Ledbetter* case it was held that under the Rules of Civil Procedure a motion to dismiss takes the place of the old demurrer and in considering the motion the Court must treat every properly pleaded allegation of fact in the complaint as true.

Also see *Ansehl v. Puritan, Etc.,* 61 F.2d 131 (8th Cir.). At p. 133, Judge Sanborn states:

> "Since such a motion to dismiss has taken the place of a demurrer, it is elementary that it admits all material facts well pleaded in the complaint, that only defenses in point of law appearing upon the face of the complaint may be considered, and that, unless it is clear that, taking the allegations to be true, no cause of action in equity is stated, the motion should be denied." (Citing cases).

In

United States v. Frankfort, Etc., 324 U.S. 293; 65 S.Ct. 661,

it is held that facts alleged in an indictment stand admitted on demurrer and on a plea of nolo contendere. Also see

U.S.C.A. T. 28, p. 890, Note 475.

In the instant case a reading of the whole decision of the lower court shows His Honor's determination to find on the facts himself and to leave nothing for a trial court or a jury. The court handled the case exactly as though it were being tried on its merits; as a matter of fact, not one of the cases which we have cited above is anywhere nearly as strong in its violations of such rules as to summary judgment as the decision of the lower court in this particular matter.

We respectfully submit that the lower court in ignoring completely the rules laid down above and deciding direct questions of fact on the merits thereof makes it necessary that this Court reverse the decision of such Court and send this action back for trial upon the merits.

II.

The Conspiracy Is the Gravamen of a Treble Damage Action Such as the Present

The conspiracy of appellees to violate both Sections 1 and 2 of the Antitrust Act is the *cause of action* on which appellants are proceeding, and the overt acts alleged in the complaint and performed pursuant to such conspiracy are the yardsticks which measure the right to damages suffered by appellants as a result of such conspiracy and violations of said Secs. 1 and 2 by the appellees.

The overt acts form no part of the conspiracy which, as stated, is the "cause of action."

In *Nash v. United States,* 229 U.S. 373; 33 S.Ct. 780, it was held:

> "No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the antitrust act of July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability."

Also see—*United States v. Socony, Etc.,* 310 U.S. 150; 60 S.Ct. 811, where it was held:

> "Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of an unlawful conspiracy in restraint of trade and commerce. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1."

See the discussion on this point on p. 219 of the Official Report.

Likewise, see *United States v. New York, Etc.* (5 Cir.), 137 F.2d 459; (Cert. denied, 320 U.S. 783); at p. 463 the Court said:

> "* * * Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232, and United States v. Socony Vacuum Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, settle it that the offense of conspiracy under the Sherman Act is complete when the agreement or conspiracy is formed, that jurisdiction and venue lie in the district where it was formed, and that it is not necessary to allege the commission of an overt act. It is settled, too, that a conspiracy in restraint of trade is, or may be, a continuing offense, United States v. Kissel, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168, and that 'A conspiracy thus continued in effect renewed during each day of its continuance,' United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 190, 84 L.Ed. 181. As each new member later joins the conspiracy, he in effect makes the agreement then and there to become a party to it."

Also, on p. 464 the Court said:

> "* * * It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. *It is equally clear that it is of no importance whether the means used to accomplish the unlawful objective are in themselves unlawful.* Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are a part of the sum of the acts which are relied upon to effectuate the conspiracy the Sherman Act forbids, they fall within the condemnation of the statute."

In—*United States v. General Motors, Etc.,* 121 F.2d, it was said (pp. 404 and 405):

> "* * * proof of the conspiracy would have been sufficient to sustain a conviction even if the conspiracy had never been carried out. This is true because the offense condemned by the Sherman law is the act of conspiring, and neither actual restraints nor overt acts need be proved. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252, 60 S.Ct. 811, 84 L.Ed. 1129."

Also see—*United States v. Armour* (10 Cir.), 137 F.2d, at p. 271.

While the foregoing are criminal cases (which we submit are no different, so far as the rule in question is concerned, from civil actions), the same rule is applied in civil actions for treble damages.

See—*Albert Pick-Barth Co. v. Mitchell, Etc.,* 57 F.2d 96 (Cert. denied, 286 U.S. 552; 52 S.Ct. 503), which was a civil action for treble damages. On p. 102 the Court stated:

> "To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. *Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1;* but if overt acts are proved in furtherance of the offense defined in section 1, and any one is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor."

The Pick-Barth case cites:

> *Chattanooga Foundry, Etc. v. Atlanta,* 203 U.S. 390; 27 S.Ct. 65,

which was also a civil action and which holds that Congress "had power to give an action for damages to an individual who suffers by breach of the law." (Citing a case in support.) P. 396-397 Official Reports.

This confirms the claim expressed above: That the conspiracy formed by the appellees *constituted in itself the wrong which immediately gave to appellants their cause of action.* This holding demonstrates the distinction between the cause of action (the conspiracy) and the damages suffered by appellants as a result thereof (the overt acts), thus confirming the statement that a cause of action and overt acts are separate and distinct.

This point is very important so far as the statute of limitations is concerned. We earnestly contend, and the cases so

hold, as we shall hereafter show, that in a case of fraud or concealment, such as the present, the statute of limitations does not begin to run until the discovery of the *cause of action,* which here is the 1929 Conspiracy.

In the opinion of the lower court (R. 618), it is stated:

> "All of the cases cited by the plaintiffs as upholding their contention that the existence of a conspiracy is in itself sufficient basis for a cause of action are cases of criminal prosecution by the government."

Such statement is not the fact as is shown clearly by the *Pick* case; therefore, until appellants discovered the existence of the '29 conspiracy at the time the Government commenced its actions (September, 1944), the statute of limitations did not commence to run on the cause of action (the conspiracy), and the complaint herein being filed within three years thereafter according to the moratorium on the statute hereinafter referred to, the plea of the statute was not available to these appellees. All of the questions of fact referred to in the foregoing statement stand admitted by the appellees on these motions.

III.

In a Situation Such as the Present Where There Have Been Continuing Overt Acts, the Statute of Limitations Does Not Begin to Run Until the Performance of the Last Overt Act Performed Pursuant to the Conspiracy.

In *Fiswick v. United States,* 329 U.S. 211; 67 S.Ct. 224 (p. 216 of the Official Report), it is held:

> "The statute of limitations, unless suspended, *runs from the last overt act during the existence of the conspiracy.* Brown v. Elliott, 225 U.S. 392, 401, 32 S.Ct. 812, 815, 56 L.Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy."

The *Fiswick* case cites

> *Brown v. Elliott,* 225 U.S. 392; 32 S.Ct. 812.

On p. 815 of the Supreme Court Rep. the Court said:

> "In Lonebaugh v. United States, 103 C.C.A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: 'While the gravamen of the offense is the conspiracy, the terms of sec. 5440 (U.S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U.S. 62, 76, 50 L.Ed. 90, 94, 25 Sup. Ct. Rep. 760); and so the period of limitations must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy there are successive overt acts, **the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.** (Citing cases)'."

Here the last overt act was the sale of December, 1942, described in Paragraph 88, particularly Subdivision (e) of the complaint (R. 73). The subdivisions and paragraphs immediately preceding and those immediately following such Suddv. (e) set forth in detail further facts surrounding the existence and performance of such overt act. Please remember that all of such allegations of the complaint are admitted by appellees on the motions to dismiss and for summary judgment. While December, 1942, was more than three years prior to the commencement of this action, the period of time from June 1942 to June 1946 was tolled by the Act of Congress known generally as the Moratorium Act and discussed in the succeeding subdivision of this brief.

IV.

The Moratorium Act of 1942, and the Amendments Thereto, Tolled the Statute of Limitations Until June 30, 1946

In October, 1942, Congress passed an Act providing for the suspension of the statute of limitations in all actions for violations of the Antitrust laws of the United States. That Act, together with the amendments and extensions thereto, provided as follows:

Act, October 10, 1942, Ch. 589, 56 Stat. 781, provided:

> "Sec. 1. The running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, *now indictable or subject to civil proceedings under any existing statutes,* shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.
>
> "Sec. 2. That this Act shall be in force and effect from and after the date of its passage."

As of June 30, 1945 the above moratorium was extended until June 30, 1946.

> Ch. 213, Public Law 107, U. S. Code Congressional Service, 79th Congress, First Session 1945:
>
> "CHAPTER 213—PUBLIC LAW 107
> (S. 937)
>
> "An Act to amend the Act suspending until June 30, 1945, the running of the statute of limitations applicable to violations of the antitrust laws, so as to continue such suspension until June 30, 1946.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:
>
> "The first section of the Act entitled 'An Act to suspend until June 30, 1945, the running of the statute

of limitations applicable to violations of the antitrust laws,' approved October 10, 1942 (56 Stat. 781; U.S.C., Supp. III, title 15, note following sec. 16), is amended by striking out the date 'June 30, 1945' where it appears in such section and inserting in lieu thereof the date 'June 30, 1946.'

"Approved June 30, 1945."

Applying these suspension statutes to the present situation: The second release was given December 21, 1942 (R. 73)—two months after passage of the Second Moratorium Act which extended the date of June 30, 1945, to *June 30, 1946.* The second release (Dec. 1942, R. 73) constituted an overt act in the conspiracy of 1929. The complaint herein was filed September 11, 1947. Three years from December 21, 1942 would be December 21, 1945, at which time the suspension of the statute was in effect. The complaint was filed approximately one year and three months after the end of the moratorium on June 30, 1946. Therefore, irrespective of whether or not the statute was tolled by fraud and concealment, which we earnestly contend was the fact, the last overt act, viz., the release of 1942, was well within the three-year period preceding the filing of the complaint and thus the statute is not applicable hereto. In making such statements we do not waive our claims that the statute was tolled by the fraud and concealment of appellees, or that the conspiracy was a continuing conspiracy or that the statute runs from the last of a series of overt acts.

V.

The Conspiracy of 1929, Charged in the Complaint, Was a Continuing Conspiracy, and Neither the Statute of Limitations Nor the Application of Laches Commenced to Run Until the Completion of the Last Overt Act Performed Pursuant to Such Conspiracy, and Which Was the Settlement Agreement of December 1942.

This was definitely decided in

United States v. Kissel, 218 U.S. 601, L.Ed. 1168.

This was an antitrust case and is controlling in appellant's favor. There it was held:

> "2. A conspiracy to restrain or monopolize trade, in violations of the Sherman Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U.S. Comp. Stat. 1901, p. 3200), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy."

The true rule was set forth by Justice Holmes on page 607, where he states:

> "The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irving, 98 U.S. 450, 25 L.Ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than

to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

Also see page 610, where the Court further stated:

"To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency it not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide."

In the case of *Brown v. Elliott,* 225 U.S. 392, 32 S.Ct. 812 at p. 819, the following statement there made is most applicable to the present situation. There it was said, in part:

"Where, during the existence of the conspiracy, there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which*

there is an appropriate allegation and proof, and this, although the earlier acts may have occurred more than three years before the indictment was found.

In the following cases similar statements were made:

Braverman v. United States, 125 Fed.2d 283, at page 287:

"A conspiracy continues insofar as the statute of limitations is concerned, so long as there is a course of conduct in violation of law to effectuate its purpose."

Hedderly v. United States, 193 Fed. 561 (Ninth Circuit); at page 569:

"Where the conspiracy contemplates various overt acts and the consequent continuance of the conspiracy beyond the commission of the first act, each overt act thereafter gives a new, separate, and distinct effect to the conspiracy, and constitutes another agreement, so that a prosecution is not barred by the statute of limitations until three years after the commission *of the last overt act alleged and proved.*"

United States v. McWilliams, 54 Fed. Supp. 791, at page 794:

"The indictment clearly charges a continuing conspiracy. * * * True enough it is well settled that as to conspiracies under 18 U.S.C.A., Sec. 88, which do not become crimes until an overt act has occurred, the statute of limitations starts to run from the date of the last overt act, each succeeding overt act, if more than one, being considered the consummation of a new or revived conspiracy."

Here, the complaint shows the formation of a conspiracy and the continuing activities of the appellees thereunder. The charge of a continuing conspiracy is set forth in Paragraphs 92 (R. 77) and 93 (R. 78), the latter paragraph making the charge that each separate thing and act alleged and performed by the appellees has been and was an act, thing, or combination contributing to and forming a part of an overt act of such continuing conspiracy. The overt acts are set forth throughout the

complaint, particularly beginning with Paragraph 83 (R. 53). From then on the complaint has to do solely with the activities of appellees against appellants setting forth a statement of such activities and the various injuries inflicted by appellees upon appellants as a result of appellees' violations of the antitrust act. In Paragraph 92 (R. 77), it is charged that all of these acts were performed pursuant to and in furtherance of the general conspiracy of 1929.

We respectfully submit that the facts here presented fit in exactly with the law laid down in the case of *United States v. Kissel,* supra, and the other authorities cited supra; hence the motion to dismiss should have been denied irrespective of the question of knowledge or discovery by appellants of the 1929 conspiracy prior to September 1944. In computing the time neither the Moratorium referred to hereinabove nor the provisions of T. 15, Sec. 16, can be overlooked. The Moratorium was for four years and the time included within Sec. 16 U.S.C.A. was possibly a year, so that five years must be deducted in any computation of the statute.

Each one of the activities of appellees as set forth in the complaint constituted an overt act pursuant to the continuing conspiracy of 1929, until the last settlement in 1942. The complaint alleges (pars. 92 and 93, R. 77-78) that the 1929 conspiracy was a continuing conspiracy and that all of such acts of appellees alleged in the complaint were pursuant to the same, and on this motion such allegations stand admitted. The Moratorium heretofore referred to was in force at the time of the said last settlement in 1942, the final overt act, and did not expire until 1946 so that the statute did not commence to run until three years after the last named year.

The lower court in its decision (R. 615-616) sets forth the contentions of appellants and appellees, one of such contentions on behalf of appellants being to the effect that by reason of the Moratorium above referred to the statute was tolled. Later on in setting forth the contentions of appellees (R. 616),

the lower court states that among the contentions of appellees is one to the effect that "the Federal Moratorium statute is not applicable to suits by private parties." In spite of these two references to the Moratorium Act, the lower court failed entirely to pass upon the question of the applicability of such Moratorium and no mention of it is made in the deciding portion of such decision. The Moratorium is totally ignored and the lower court places its decision upon the applicability of the California statute of limitations (R. 621). This was a grievous error and alone calls for the reversal of this case.

VI.

The Fraud and Concealment of Appellees Set Forth in the Complaint and Admitted by Appellees Tolled the Statute of Limitations Until the Discovery by Appellants of Their Cause of Action Against Appellees and Which Discovery Was Made in September 1929, at the Time the Government Commenced Its Action and Secured Its Indictment Against Certain of the Appellees.

Paragraph 89 of the complaint (R. 75) alleges that none of the plaintiffs (appellants herein) had any knowledge or intimation of the general conspiracy of September 1929 until the Government secured its indictment and brought its action. It is also alleged in such paragraph that such conspiracy was at all times fraudulently and otherwise concealed from appellants. The facts set forth in such paragraph are admitted for the purposes of these motions. The facts attempted to be set up by appellees in their affidavits and exhibits accompanying their motions to dismiss and for summary judgment cannot be used to defeat the allegations of such paragraph, for to permit such defense would be contrary to the authorities cited, supra, and to permit the trial of questions of fact on this motion. The purpose of such affidavits of appellees is to deny the allegations of paragraph 89 to the effect that appellants had no knowledge of the conspiracy of '29 or that the activities of appellees constituted

violations of the antitrust laws. Whether or not such was the fact is a fact which must be determined on the trial of the action on the merits and cannot be passed upon as the lower Court attempted to do on such motions as are here presented. The law is, as we shall show, that in cases of fraud or concealment the statute is tolled until the discovery of the cause of action by the wronged party. Such are all questions of fact.

As alleged in Paragraph 91 (R. 77) and admitted by appellees, the general conspiracy of 1929 was a fraud upon appellants and intended as and for the purpose of destroying appellants and their businesses and was fraudulently concealed by appellees until the time of the discovery of such general conspiracy by appellants.

A conspiracy to destroy a party financially is in and of itself a fraud upon such party against whom such conspiracy is directed. That is fundamental and a statement of the rule of natural justice.

Broadly speaking fraud is defined in 37 C.J.S., at page 204, as follows:

> "An act or course of deception deliberately practiced with the view of gaining a wrong or unfair advantage; deceit; trick; an artifice by which the right or interest of another is injured." (Cited in support Eliason v. Wilborn, 167 N.E. 101; affirmed 50 S.Ct. 382; 281 U.S. 547.)

The quotation is from the opinion of the Illinois Supreme Court, and is really a quotation from

Storey's Equity Jurisprudence, Vol. 1, Secs. 186, 187.

This case was affirmed by the Supreme Court without any discussion of the question of fraud but the affirmation of the Illinois court's decision indicated approval by the Supreme Court of such holding as to fraud.

The overt acts set forth in Paragraph 83 of the complaint (R. 53) and admitted by appellees, show without question the frauds inflicted upon and concealed from appellants by appellees; particularly so is the story of the bankruptcy proceedings com-

mencing with Subdivision (c) of such paragraph (R. 55). The fraudulent acts of appellees and committed to bring about such proceedings, were, we submit, vicious and sufficient in themselves to warrant the relief sought herein. When added to the other activities charged in the complaint and admitted by appellees they definitely show the fraud and concealment necessary to toll the statute until the discovery in September 1944 of the reason and cause for all of such wrongs, namely, the conspiracy to destroy appellants and formed in September 1929. Any references during the intervening years and made by appellants to appellees as violators of the antitrust law are of no moment as against the allegations of the complaint to the effect that appellants had no knowledge of their cause of action (conspiracy of '29) until the time of the institution of the Government actions. Such allegations of appellants are admitted for the purpose of these motions and the truth thereof cannot be tried out on the hearing of the same. They are all questions of fact which call for a trial on the merits. Furthermore, *mere suspicion,* or even *belief,* in the existence of facts not definitely *known* does not constitute discovery or knowledge nor is it sufficient to start the running of the statute. Such is the ruling of this Court.

See *Fleishhacker v. Blum,* 109 F.2d, 543. On p. 548, the Court said:

> "The applicable statute (Cal. Code of Civil Proc. Sec. 338, sub. 4) provides that an action for relief on the ground of fraud or mistake must be brought within three years, but that 'the cause of action in such case (is) not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' The aggrieved party in this case is the Bank. (Citing cases). The trial court, however, made no finding as to the time the Bank discovered the fraud. It found only that the plaintiff stockholders did not discover it until less than three years before the commencement of the action.
>
> * * * * * * *

"We are satisfied that the proof is such as to require a finding that the Bank did not discover the fraud until appellees brought it to light by their investigations. Hence the action is not barred as to the Bank.

"The word *'discovery',* as used in the statute, *means actual knowledge,* or knowledge of facts which, in the exercise of due diligence, would have led to an actual discovery of the fraud. Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 701, 703, 16 P.2d 268; Lady Washington etc. Co. v. Wood, 113 Cal. 482, 45 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243; Prentiss v. McWhirter, 9 Cir., 63 F.2d 712, 715."

Also see:

Kalruth v. Resort Properties, Ltd., 57 Cal. App. 2d, 146; 134 P.2d, 513.

On p. 150, the court states:

"We believe that when, as here, the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated."

An important case on the question of fraud and its discovery is that of

Hansen v. Bear Film Co., Inc., 28 Cal. 2d, 154, Subs. 11 and 12.

"Where a defendant is guilty of fraudulent concealment of a cause of action, the statute of limitations is deemed not to become operative *until the aggrieved party discovers the existence of the cause of action.* (Note: Court says *cause of action*—which here is the 1929 conspiracy. This insertion is ours.)

"Where one coadministrator of a decedent's estate conceals facts from another coadministrator which would constitute a cause of action against the first administrator with respect to corporate stock transferred to said administrator

in trust for decedent, such concealment prevents the statute of limitations from running against the action during administration of the estate, *until discovery of the true facts.*" (Italics ours.)

The California law on this question of the tolling of the statute was finally settled in the case of

Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203; 30 P.2d, 39.

In that case it was held:

"Independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until *discovery,* at which time the statute applicable to that particular action then commences to run."

"While in actions at law plaintiff's mere ignorance of the existence of the injury, or of facts constituting such injury, or of the identity of the wrongdoer, does not toll the statute, as far as a legal action for personal injuries is concerned *the fraudulent concealment by the defendant of the facts, upon the existence of which the cause of action depends, does toll the statute, which does not begin to run until discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts.*"

"In this action for damages for personal injuries resulting from the negligence of a fellow employee who had been loaned by plaintiff's employer to defendant, where the complaint alleged that said employer at all times advised plaintiff that it was responsible for the accident, that defendant fraudulently agreed with said employer that if the facts were concealed from plaintiff it would pay one-half of the amount spent on plaintiff's case, and *that he had no knowledge of his cause of action until the discovery of a letter relating to said agreement, the facts pleaded were sufficient to toll the statute of limitations until such discovery.*" (Italics ours.)

The same situation is present in the case at bar, for the facts surrounding the cause of action were concealed by the defendants.

A like rule was laid down in

Pashley v. Pacific Elec. Ry. Co., 25 Cal. 2d, 226.

"A defendant having by fraud or deceit concealed material facts and by misrepresentation hindered plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong. *The rule is applicable irrespective of whether the action itself be based on fraud.*" (Italics ours.)

"The statute of limitations is intended as a shield for a defendant's protection against stale claims, but he may not use it to perpetuate a fraud on otherwise diligent suitors."

"When a defendant is guilty of fraudulent concealment of a cause of action, the statute of limitations is deemed not to become operative until the aggrieved party *discovers the existence of the cause of action.* (Italics ours.)

The "point of discovery" is discussed on page 229. This case holds directly that the statute does not begin to run until the injured party discovers the *existence of the cause of action.* Here, the cause of action was the conspiracy entered into by the appellees and until that conspiracy was actually discovered by appellants neither the statute nor laches commenced to run. And this rule is applicable whether or not the action itself be based on fraud. See p. 232, Subd. (4).

In this case the court quoted from

Waugh v. Guthrie, Etc. Co., 37 Okla. 239; 131 Pac. 174, at 178,

as follows:

"In *Waugh v. Guthrie, etc. Co.,* supra, it was held that the employment of artifice in concealing the cause of an explosion from which the plaintiff sustained injuries amounted to fraudulent concealment which tolled the statute, the plaintiff having been diligent in his efforts to ascertain the cause. The court said: 'It is no sufficient answer to say, as have counsel in their brief, that plaintiff must have known that he was blown up, and realized that he was injured. This he undoubtedly knew; but it was the

fact that defendant by its negligence was the cause of the injury that gave rise to the cause of action against it, not the mere fact of injury. Upon the trial the party relying on fraudulent concealment of the cause of action to avoid the statute would have the burden of proving such concealment. Following what we believe to be the great weight of authority, and keeping in mind that the very purpose of the statute of limitations was to prevent fraud and not to make it secure and successful, we conclude that the petition stated a good cause of action, and that the trial court erred in sustaining the demurrer.' "

Suspicion on the part of appellants that appellees were violating the anti-trust law and even their belief that such was the fact, does not start the running of the statute of limitations.

American Surety Co. v. Pauly, 170 U.S. 133.

On page 145, the court said:

"* * * It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier; * * * He may have had suspicions of irregularities; he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct."

Therefore by reason of the foregoing facts and law the motions to dismiss should have been denied and the case sent back for trial on the merits. Not only by reason of the facts charged and admitted but also upon the ground that a question of fact as to the existence of such fraud and concealment and the time of the discovery thereof had been brought into existence by the filing of the motions and therefore the Court was obligated by the rules hereinabove set forth to deny the motions.

VII.

The Tolling of the Statute by Reason of Fraud and Concealment Is Applicable to Actions at Law as Well as Those in Equity

This is a rule of long standing in the Federal courts—in the Supreme Court and in the Circuits.

American Tobacco Co. v. Peoples Tobacco Co., 204 Fed. 58 (C.C.A. 5th),

was a civil action at law for damages under the antitrust act and was a case similar in many respects to the one herein presented. On p. 61 the court said:

> "The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the Peoples Tobacco Company knew, or ought to have known, of the agreement or arrangement called 'a combination or conspiracy' on the part of the other tobacco companies against it. *While it might have known that its profits were falling off, and that the competition of the Craft Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run.* We think this states substantially the law of the case, and is the correct view of the question of prescription."

The italicized portions of the above quotation show the striking similarity to the facts presented in the case at bar, for here, while appellants knew that they were being damaged, and may have at various times believed that the acts of appellees were the cause thereof, that alone did not give appellant a cause of action under the Sherman law until it discovered the conspiracy of 1929. Further, the Court stated (p. 63) as follows:

"Why should not the prescriptive period in this case commence at the time the combination against the plaintiff was discovered? The Sherman Act gives the right to an action for conspiracy to injure the business of the plaintiff, such as was alleged, and such as we consider to have been established in this case. No action could be brought by the plaintiff until he had knowledge of the facts which gave him a cause of action. We think the court below was right in holding as it did on this question."

The Court cited and relied upon the case of

Bailey v. Glover, 21 Wall. 342; 22 L.Ed. 637.

On p. 62 the Court in the Tobacco case quoted from *Bailey v. Glover* as follows:

"In Bailey v. Glover, 21 Wall. 342, 22 L.Ed. 636, in the opinion by Mr. Justice Miller, this is said:

'In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party.'

"Afterward in the opinion the following is added:

'But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed

or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'

"This case of Bailey v. Glover has since been frequently recognized in decisions by the Supreme Court and other United States courts. In Traer v. Clews, 115 U.S. 528, 6 Sup. Ct. 155, 29 L.Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U.S. 538, 6 Sup. Ct. 159, 29 L.Ed. 467):

'The case of Bailey v. Glover has never been overruled, doubted, or modified by this court.'

"Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here."

The rule established in Bailey v. Glover was adopted by the Supreme Court in *Holmberg v. Armbrecht,* 327 U.S. 392, 66 Sup. Ct., 582. There the Supreme Court stated:

"Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of statute of limitations does not begin to run until the fraud is discovered, though there may be no special circumstances or efforts on part of party committing fraud to conceal it from other party."

On page 395 the Court further stated:

"* * * Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to

> actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitations (citing cases) * * *. The present case concerns not only a federally created right, but a federal right for which the sole remedy is in equity (citing cases). * * * When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

After further discussion, the Court went on to say:

> "Equity eschews mechanical rules: it depends on flexibility. Equity has acted on the principle that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced * * * (citing cases). And so a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against another form of fraud" * * *.
>
> "It would be too incongruous to confine a federal right within the bare terms of a state statute of limitation unrelieved by the settled federal doctrine as to fraud when even a federal statute in the same terms could be given the mitigating construction required by that doctrine."

Holmberg v. Armbrecht—is the leading case on the subject. It is a crystallization of a legal doctrine which for decades has been in the making. In it, for an all but unanimous court, Mr. Justice Frankfurter considers the problems presented in cases which seek to vindicate federal-established rights and the relevant Acts of Congress contain no statute of limitation. He points out that in the silence of Congress state law has been drawn upon to fill in the interstices; insists that "it would be incongru-

ous to confine a federal right within the bare terms of a state statute of limitations"; and insists that "federal courts, sitting as national courts throughout the country" should apply their own principles in enforcing a right created by Congress. The opinion, in specific terms, holds that when a plaintiff has not slept on his rights the statute of limitations should not begin to run until the fraud is discovered.

The instant case and the *Holmberg* case are much alike; and they present the same issue in respect to the use of the state statute of limitations in cases seeking to vindicate rights granted by Congress. The two cases are alike suits for money damages. In each there has been the successful concealment of fraud, delaying the framing and filing of the complaint. The difference is that whereas in the *Holmberg* case, the fraud and the concealment thereof is proved, in the instant case it is, through failure to deny the allegations, admitted. The *Holmberg* case is technically in equity because its concern is with bankruptcy; but, had a prayer for an injunction been added, the instant case could have been made to sound in equity. If in the *Holmberg* case, the plea of the statute of limitations is rejected, while in the instant case it is accepted, so substantial a difference in the administration of justice ought not to depend upon so irrelevant a standard as the historical name by which the cause of action is called. It is to the point that the rationale which supports the *Holmberg* decision applies without qualification to the instant case. If there is a difference, the rule ought to apply *a fortiori* in the instant case; for, whereas in a bankruptcy proceeding, it is only the group of creditors, large or small, which is injured, the very purpose of the suit for triple damage is to vindicate the right not only of the private suitor but of the general public as well.

To conclude this point: the distinction between law and equity is rapidly being done away with in order to reach the fundamental desire to do full justice between the parties involved and without the necessity of stepping from the "law" table

in the courtroom to the "Equity" table in the same room in order to satisfy the old common law distinctions between law and equity. The modern method of allowing one and the same judge to pass upon both legal and equitable questions is but one illustration of the modern trend to simplification of remedies and procedure. Equitable defenses, permitted in many purely legal actions, is another illustration. The three authorities cited in this subdivision, particularly *Bailey v. Glover,* supra, conclusively show the present intent of the courts to allow a wronged party, especially when such wrong is based in fraud and concealment as is here present, the benefit of what at one time were denominated strictly equitable pleadings or steps. While we contend that the present proceeding, due to the fraud here present as alleged and admitted, could for the purposes required permit its designation as equitable, we equally contend that it is immaterial how it is designated and that, pursuant to the authorities here cited, all manner of pleas or defenses whether called legal or equitable are available to appellants.

VIII.

The Statute of Limitations Cannot Be Raised on a Motion to Dismiss

R. C. P., Rule 8(c):

> "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, *release,* res judicata, statute of frauds, *statute of limitations,* waiver, and any other matter constituting an avoidance or affirmative defense. * * *"

Also see—Rule 12(b).

In *Dirk Ter Haar v. Seaboard, Etc.,* 1 F.R.D., p. 598 (S.D. Cal.), it is held:

"The defenses of laches, stale demands and the statute of limitations may not be asserted by motion to dismiss, but should be set forth affirmatively in defendant's answer (Federal Rules of Civil Procedure 8(c), 12(b), 28 U.S. C.A. following section 723c. Patsavouras v. Garfield, D.C., 34 F. Supp. 406; Munzer v. Swedish American Line, D.C., 30 F. Supp. 789; Holmberg v. Hannaford, D.C., 28 F. Supp. 216; Raker v. United States, D.C., 1 F.R.D. 432; Baker v. Sisk, D.C., 1 F.R.D. 232; Nordman v. Johnson City, D.C., 1 F.R.D. 51), and that same rule prevails as to the defense of pendency of another action. F.F.C.P. 12(b); Sproul v. Gambone, D.C., 34 F. Supp. 441."

To the same effect is *Carlisle v. Kelly Etc.,* 72 Fed. Supp. 326 (D.C. E.D. Penn.), where the court stated (Subd. (1)):

"The first reason advanced by the defendant is that the plaintiff's claim is barred by the applicable statute of limitations, which it contends is the statute of limitations of the State of Delaware, where the accident occurred. Under Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *the defense of statute limitations may not be raised by motion, but must be affirmatively pleaded.* Kraushaar v. Leschin, D.C.E.D. Pa., 4 F.R.D. 143; Massachusetts Bonding & Ins. Co. v. Darby, D.C.W.D. Mo., 59 F. Supp. 175. Therefore, I cannot consider the validity of this defense on the present motion."

Such is the ruling of this Court. See *Bowles v. Glick Bros., Etc.,* 146 F.(2) 566 (9th Cir.), where it is stated:

"The defenses which may be interposed by motion are confined to those enumerated in Rule 12(b).

Rule 12(b) is as follows:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the *responsive* pleading thereto if one is required except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person,

(3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an *indispensable party.* A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."*

This rule must be read in the light of Rule 8(c) set forth, supra.

The most that could be claimed for Rule 12(b) in the present case is that the motion to dismiss will be considered as a motion for summary judgment in accordance with Rule 56. Such an interpretation would call for the adoption of the rule of law (supra) that the court cannot pass upon a direct question of fact presented by the complaint and responsive affidavits for as soon as such pleadings disclose that a question of fact exists the motion must be denied and the parties sent to trial upon the merits.

Therefore, by reason of the foregoing, the lower court erred in considering the various pleas of the statute of limitations and the judgment should be reversed.

IX.

The Question of the Two Releases of 1934 and 1942 Urged by Appellees Cannot Be Considered on the Motions to Dismiss and for Summary Judgment and Must Be Raised in an Affirmative Defense. Also, the Lower Court Erred in Considering and Passing Upon the Facts Presented by and Surrounding the Claimed Releases in Question.

The complaint describes the 1934 release in Paragraph 84 (R. 65); the 1942 release and sale are fully described in Paragraph 88(E) (R. 73).

In the affidavit of Mr. Lasky he refers to these two releases (R. 127), and the same are attached to such affidavit as Exhibit 11 (R. 273) and Exhibit 12 (R. 413).

Rule 8(c) covering affirmative defenses states directly that a party shall set forth *affirmatively,* a claim of Release; accordingly, the lower court was without jurisdiction to entertain any consideration of such question.

In *Jack, Etc. v. Associates, Etc.,* 125 F.(2) 778 (3 Cir.), it was held (Subd. (14)): that in an action on contract, release is new matter constituting a defense and, if relied upon, must be specially pleaded. Citing Rule 8(c).

In addition to the foregoing and supplementing the discussion on the questions of fact surrounding the execution and effect of the releases, permit us to advance the following contentions, namely:

In spite of the fact that the presentation of these releases raises distinct and separate questions of fact, the lower court instead of denying the motions upon such ground proceeded in its opinion to refer to such releases (R. pp. 614 and 615), and then presumed to rule on the same in two places, namely (R. 619), where it states:

> "Too, the record seems to firmly establish the fact that the plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-Trust Laws. Such fact precludes plaintiffs from availing themselves of this exception which

would toll the statute of limitations until the alleged date of discovery in 1944." (Note: The Court fails to fix the date when "the plaintiffs knew or had reason to believe" it might have been within the statutory period.)

And further states (R. 620):

"In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction."

Here the Court has made two findings of fact as fully and to all intent and purposes as though the case had been tried upon the merits and it had found from the evidence presented by both sides as set forth in such quotations. This was pure error and alone calls for the reversal of this case.

The facts of *Frederick Hart & Co. v. Recordgraph Corp.,* 169 F.(2) 580 (3 Cir.) and cited, supra, are remarkably similar to those presented herein and we respectfully request a close examination of such citation.

On page 583 the court said:

"The foregoing clearly establishes the *existence of a fact issue* with respect to what was actually said by Murry to Weber. It was at that point that the District Court's consideration should have terminated and Recordgraph's motion denied. Instead, the District Court proceeded to *decide* the fact issue and thereby committed error under the applicable principles of law stated earlier in this opinion. It is immaterial that it *decided* the fact issue in Recordgraph's favor—the point is that it went beyond its province to resolve any fact issue on a motion to dismiss or for summary judgment. Cf. Sarnoff v. Ciaglia, 3 Cir., 1947, 165 F.2d 167." (Court's italics.)

On the consideration of the claim of Release many questions of fact would arise, among them as to whether such releases covered unknown claims and as to appellants' statements in the complaint that they would not have given such releases had they known of the 1929 conspiracy.

Section 1542 of the *Civil Code of California* provides

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor

at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The case of *Jordan v. Guerra,* 23 Cal.(2d) 469, illustrates the many questions of fact which might be raised concerning these claimed releases.

Also see

Raynale v. Yellow Cab Co., 115 Cal. App. 90; 300 Pac. 991.

Also,

Radio Corporation v. Raytheon Mfg. Co., 296 U.S. 459; 56 S.Ct. 297, which is illustrative of the "fact" questions here presented.

By reason of the foregoing, it is respectfully submitted that the lower court erred in passing upon the questions of fact presented by the defense of Release as urged and that by reason thereof the judgment should be reversed.

X.

The Lower Court Erred in Denying Appellants' Motion for Permission to Amend Their Complaint

After the rendition of the decision of the lower Court on November 22, 1948 (R. 610) and which decision was entered in the Civil Docket on November 24, 1948, appellants served notice of motion to alter or amend the judgment of dismissal (R. 621) in the following respect: By striking from such decision the last two paragraphs and inserting in lieu thereof, the following:

"It is hereby ordered that plaintiffs, above named, may, if they so elect, move this Court for an order permitting them to amend their complaint on file herein, said motion, if any, to be made on or before ten (10) days from the date of this order permitting the filing of such motion to amend."

Under date of December 17, 1948, the Court made its order (R. 623) as follows:

> "It is Ordered that the plaintiffs' motion to amend or alter the judgment entered herein on November 24, 1948, be and the same hereby is Denied.
>
> "Dated December 17, 1949
>
> /s/ MICHAEL J. ROCHE,
> United States District Judge.
>
> "[Endorsed]: Filed Dec. 17, 1948."

Rule 59(e) provides for a motion to alter or amend as made herein.

Refusal of the lower Court to permit the filing of an amendment was error.

> *Louisiana Farmers, Etc. v. Great Atlantic, Etc.,* 131 F.(2) 419.

There it was held:

> "In action by Louisiana strawberry growers' association for treble damages for violation of anti-trust laws, complaint charging an agreement or combination among retail chain grocers to control prices in interstate commerce in Louisiana strawberries, and thus eliminate competition in interstate commerce, was not so deficient in allegations of 'ultimate facts' as to justify dismissal without leave to amend on ground that 'conclusions of law' only were pleaded. Sherman Anti-Trust Act Secs. 1, 2, 7 as amended, and Clayton Act Sec. 2, 15 U.S.C.A. Secs. 12, 2, 15 and Sec. 13; Robinson-Patman Price Discrimination Act, Sec. 3, 15 U.S.C.A. Sec. 3, 15 U.S.C.A. Sec. 13a; Federal Rules of Civil Procedure, rule 8(a), 28 U.S.C.A. following section 723c."

Also (p. 420):

> "A plaintiff is entitled to opportunity to attempt to establish allegations of its complaint, regardless of how improbable it may be that plaintiff can do so."

Also see Subdivisions 5 and 10.

Also see

> *Rogers v. Girard Trust Co.,* 159 F.(2) 239 (6th Cir.).

It was stated as follows (p. 241):

> "As the appellee had filed no responsive pleading to the complaint, appellant was entitled to amend as a matter of course. Rule 15(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. Leave of the District Court was not necessary, *but it was error to deny the leave when asked.*" (Italics ours.)

The opinion of the lower Court criticizes the complaint in various respects, partially on questions of fact and partially on the failure to set forth facts sufficient to constitute a cause of action. As to any one of these the plaintiffs would be entitled in an ordinary action to amend their complaint so as, if possible, to overcome the criticisms made by the court; however, for some reason or another, the lower Court herein refused to give to appellants such a right although the authorities cited substantiated in all respect not only the propriety but the duty to permit such amendment. Among such criticisms in the opinion, and referred to above, is the following (R. 619, bottom of page), where the Court states: "Apart from such bar however, no cause of action is stated by any of the claims made by the plaintiffs, including any claim with respect to the transaction of 1942." A reference to the allegations of the complaint as to the transaction of 1942 completely refutes such statement and we respectfully ask this Court to make an examination of such part of the Record. At p. 620 of the Record in the first paragraph, the Court states:

> "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the Anti-trust Laws."

Such statement certainly warranted the opportunity to appellants to amend. Further on in such opinion (R., p. 620) the court also states:

> "In a like manner, the complaint fails to affirmatively show injuries to plaintiffs' business or property for any of the transactions or event delineated."

Such statements of the Court bring appellants clearly within the rules laid down by the foregoing authorities, especially in a treble damage anti-trust case where the courts have all held that the rules of construction as to the complaint must be liberal and with the thought in mind that it is permissible to draw a complaint in such form of action in a general and non-technical manner. For some reason not disclosed the lower Court elected to apply the most drastic rules of construction to the complaint herein without benefit of the right to amend and correct, in all of which we respectfully submit that it erred grievously and without right and that therefore the judgment herein should be reversed.

CONCLUSION

We believe that we have demonstrated that the lower Court erred in its rulings in the manner set forth hereinabove and that by reason thereof and of the authorities cited in support of our grounds for a reversal this Court should reverse the judgment and send the case back for a trial on the merits and also direct the lower Court to permit appellants to amend their complaint should they so elect.

Respectfully submitted,

THURMAN ARNOLD
1200 Eighteenth Street, N.W.
Washington 6, D. C.

FRANK BUREN
2466 East 56th Street
Los Angeles 11, Calif.

STERLING CARR
One Montgomery Street
San Francisco 4, Calif.

Attorneys for Appellants